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Legal Mechanisms for the Protection of Professional Titles

Prepared by
Donald E. Milner
for
The Professional Organizations Committee

This internal working document was prepared for
The Professional Organizations Committee,
but the views expressed herein are those of the author
and do not necessarily reflect the views of the
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PROFESSIONAL TITLES


An Internal Working Document
prepared by

Donald E. Milner

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The Professional Organizations Committee

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CHAPTER I INTRODUCTION

This paper is concerned with the variety of legal mechanisms potentially available to voluntary professional¹ or occupational associations and their individual members, by which they may seek to appropriate for themselves some protected right to use professional titles or designatory initials related to their particular fields of work.

It can be stated that the formation of professional associations and the adoption of designations is apparently an attractive course for a great number of people. The quantity of voluntary professional and para-professional designating associations has grown steadily. The motives which impell persons to associate and/or adopt "designations" are not the subject of this paper. Suffice it here to say that a number of motives are possible, ranging from the purely altruistic to the utterly self-interested.

The term "professional designation" must be defined for the purposes of this paper. Obviously, it can encompass a wide range of usages. For example, "Member of X.Y.Z." may be appended to an individual's name primarily so as to indicate his affiliation with a learned society composed of persons who are working, or have worked, within a given occupation. Thus, the appendage to his name might offer to a practitioner the pride of being known among his fellows for his contribution to the "academic" side of his profession. It could be an essentially "private" sign, conveying little to non-

practitioners, other than perhaps a vaguely "honorific" glow. On the other hand, "Member of Z.Y.X." might be primarily intended to identify the individual as one who is occupied in the provision of particular services. Its content may be explicitly directed, not to his fellow practitioners, but to the consumers of services such as those which he offers. In this sense the title is an "informational" advertisement, "professional" in that the possessor uses his designation to "profess" that he is willing to offer certain services. It may also operate as a "certification" sign, designed to convey or suggest that some third party has evaluated (through whatever means) the possessor, in terms of such traditional (though often tenuous) indicia of skill and competence as education, practical experience and so on.²

The above "contents" may overlap, depending on the nature of the organization and the sign. "Certification" signs will almost always carry some "informational" content; the latter form of sign will often be suggestive of the former content. As with any verbal symbol, a professional designation is likely to convey or intimate a number of things, depending partly on the social conventions involved (e.g. most "titles" suggest some "honorific" factor) and partly on the particular context in which they are used (e.g. a "title" may be taken as a certification sign, not because of the wording of the title itself, but because consumers know that it is bestowed by an organization which sets educational or other standards for admission). Signs have both intentional and unintentional "contents." There is an old adage that the first

person to use words was also the first liar. It goes without saying that designations have the potential of being utterly misleading to their perceivers, as well as of carrying a wealth of useful information in concise form.

Two extremes are beyond the scope of this paper. Firstly, it is not concerned with designations relating to learned societies and so forth - i.e. with essentially "private" and honorific titles. Secondly, it is not concerned with the use of professional designations by persons who must be licenced to carry on a particular occupation (e.g. "barristers and solicitors" or "public accountants"). It is focused on voluntary associations that may seek to appropriate the use of a particular designation or set of initials for their members, which are intended to have (either or both) "informational" and "certifying" contents, involving the display of (a) imprimaturs and (b) generic terms in connection with members' occupational activities. By imprimaturs are meant terms which in common parlance denote, or at least carry connotations amounting to, some representation or "guarantee" of quality, reliability, peculiar skill, and so forth. This will usually entail the use of words such as "registered", "certified," "accredited", or simply "professional". By generic terms are meant words or phrases which will generally be taken as signifying or describing an occupational field or area of endeavour. These may be very wide (e.g. "secretary") or fairly narrow (e.g. "internal accounting secretary") in their import.

It is possible to envisage a spectrum along which professional designations in this sense could be placed. At one end would be found those titles or abbreviations which combine an imprimatur with a relatively narrow generic term (e.g. "certified ceiling plasterer"); at the other one would place generic designations of wide import (e.g. "plasterer"). Needless to say, the more widely generic the title, the more powerful will be the implication that its possessors enjoy something like a monopoly on the provision of particular services. (This assumes the term is used qua "title", and not merely as a job description.) "Certified ceiling plasterer" implies that there are other kinds of ceiling plasterers (non-certified ones) and other kinds of plasterers in general (wall plasterers, etc.). "Plasterer" suggests that there are, for this purpose, only two classes of persons: those who can do plastering and those who cannot. This effect is reinforced by social convention, wherein the use of generic titles ("doctor", "lawyer") is closely associated with the so-called "learned professions", whose practitioners enjoy self-regulating status and an exclusive right to engage in their professional activities. It is in this sense that the use of generic terms -- which prima facie appear to have only an "informational" content -- takes on a "certifying" connotation. The designation goes beyond merely describing the individual's professed area of competence or his availability as a provider of a given service to suggest that the possessor has some level of skill/competence which sets him apart from other persons practising in the same field.

It requires little imagination to assume that occupational associations and their individual members will be interested in securing some exclusive right to display their chosen designation. A title which may be adopted by anyone who so desires would seem to be of little value to either the professional(s) or the consumer of services. This is especially true insofar as the title is intended to act as some form of certification sign. It could lose its value or effective meaning through use of the title by persons without equivalent training or skills. Worse still, its use could become misleading if consumers continued to rely on it as a sign of distinction.

It was mentioned earlier that the motives impelling persons to associate and adopt titles are likely to be mixed. One central and obvious motive can, however, be isolated: the desire to influence the behavior of consumers in the market for members' services. It seems safe to say that the ability to identify one's area of work/competence in a readily recognizable form will be a competitive advantage in the market place. The ability to positively set oneself apart from other suppliers of services should generally be a benefit - either through the suggestion that non-titled suppliers are (somehow) "inferior" or by allowing consumers to focus on particularly appropriate suppliers according to their needs. Given the social and semantic conventions associated with professional titles, it may be that the "ignorant" consumer will seize upon the designation as a substitute for the ability to evaluate the costs and benefits involved which he lacks.

Once a group of persons has been motivated to adopt a given title, one can assume that it will also be motivated to ensure that non-members may be excluded from its use. In terms of their attempt to control the market for their services, associations should naturally aspire to exclusive use of a generic title. Especially where their field of practice is usually known by one particular generic name, this would leave the least room in the field for other organizations to offer meaningful designations to persons performing the same, or similar, functions. Moreover, this should tend towards creating a marketplace situation in which non-members could find it difficult to practise in competition with members. (This effect would, it seems, be strongest in markets where suppliers are primarily self-employed and selling services to consumers who lack the information needed to make their own price-quality judgments.)

It should also be stated that the market-control motive itself has at least two possible sub-motives. Broadly stated, professional titles may be adopted for two basic reasons: (i) to provide information (and, perhaps, "guarantees") to consumers and (ii), as intimated above, to serve the self-interest of the possessors in maximizing their return from the practice of their given occupation.

These two ends can be mutually reinforcing. For instance, a title may convey (or act as a substitute for) desirable information, alerting consumers to persons who offer particular services or guarantees of minimum quality and thus lessening the difficulty of locating appropriate practitioners. When consumers respond to the title (in the form of a pattern of demand) members' interests are served. Designations may thus be instituted in response to a need for information or some substitute or in an attempt to create and manipulate patterns of consumer demands, or some combination of the two. In an area where the costs attendant on poor quality services are significant (e.g. where the possible prejudice resulting from incompetent work or faulty consumer choices is severe), it may be to the public advantage that only persons who meet the standards of a designating body find it viable to offer their services to consumers.

Just as evidently, these two ends may be completely antithetical. For example, it is conceivable that a group could offer to its members a professional title while imposing little or

no entrance requirements beyond a membership fee. To the extent that consumers were persuaded to rely on such a title as if it were an indicator of some peculiar competence or "guarantee" the members of such group might be in a position to make higher fee or salary demands than would be "justified" by any quality differential. As in any area of consumption consumers could end up paying for unnecessary, and even illusory, factors. It goes without saying that prospective practitioners could also be ill-served if they invested effort and funds to acquire a designation which in fact offered them no advantage in securing employment.

Of course, the "positive" and "negative" aspects of professional designating schemes can occur in many combinations. For example: while it may be to the good of consumers that a group of persons has organized to assume a title and has thereafter effectively driven non-designated persons from the marketplace (i.e. has achieved de facto licensure conditions), the attendant monopoly on the supply of services may or may not outweigh that advantage.

Potentially then voluntary designating bodies may have a strong impact on their markets. Equally, their effect may be negligible. The importance of a designation will obviously vary with the conditions of the particular market. One imagines that employers or large corporate clients would be less likely to rely on titles as a selection factor than would unsophisticated household consumers. Thus, the nature of the clientele should affect the

"value" of the title to both possessor and public. Other factors may have a similar influence: the resources of the association involved, for example, could affect its ability to promote familiarity with, and reliance on, its title.

Many other questions present themselves for consideration. The phenomenon of "certifying" designations opens the topic of certification regimes as a mechanism of quality control. It would be interesting to know what the actual affect of some voluntary designating associations on their markets has been. The query could also be made whether voluntary "self-designation" or "self-certification" by private groups should be permissable activity at all: it may be that the proliferation of groups with "official-sounding" names creates confusion and dilutes the value of government-sanctioned titles; or it may be that the activities of private associations have such a minimal effect that they can be generally ignored.³

These topics are beyond the range of this paper. Chapter II looks at some of the legal mechanisms which could be of avail to voluntary associations as means of protecting against the unauthorized adoption of their chosen titles. Some attempt is made to weigh the relative efficacy of these mechanisms. In addition, they are briefly discussed in terms of the potential opportunity each mechanism contains for taking some account of the "public interest" in accurately suggestive/informative titles. Chapter III is devoted to a examination of "reserve of title" status under the recent Quebec Professional Code, S.Q. 1973, C.43, as amended.

Appendix 01 to this paper identifies some of the major designating (non-licensing) associations in the Professional Organization Committee's population of accountants, architects, engineers and lawyers. On occasion groups from this listing are specifically mentioned in the following pages, but only where they provide some particularly apt illustration. No comment upon the actual motives of these groups, their relative success in protecting their titles, nor their effect on the public interest is intended.

Footnotes

1. Unless otherwise indicated by the context, the term "professional" is used herein in its widest sense -- i.e., as virtually synonymous with "occupational".

Needless to say designating associations may be formed by many persons who are not "professionals" within any narrower definition of that term.

2. The use of certification schemes as a means of quality control in service markets has been examined elsewhere by the P.O.C.

I use the definition of certification proposed by Friedman, "Occupational Licensure," Capitalism and Freedom (Chicago: 1962) 137 at 144:

"The...agency may certify that an individual has certain skills but may not prevent, in any way, the practice of any occupation using these skills by people who do not have a certificate".

3. See Issues Paper to the P.O.C. by the Institute of Chartered Accountants of Ontario (November, 1976) at 4-7

The ICAO is concerned that designating associations are allowed to gain "quasi-official" status through private incorporation, and that the law relating to such groups (e.g. whether they are subject to The Statutory Powers Procedure Act. S.O. 1971, c.47) is unclear. The ICAO suggests that only government-recognized groups be allowed to provide professional titles in the accounting field.

CHAPTER II LEGAL MECHANISMS FOR THE PROTECTION OF PROFESSIONAL TITLES

II. Introduction

This chapter briefly describes a number of legal mechanisms which have some potential bearing on the ability of voluntary professional groups to protect their chosen professional titles or designatory initials from unauthorized use by non-members.

Section A describes the system of statutory protection which is applied to some professional titles. Section B outlines the civil action known as "passing off." Section C deals with registered trade marks under the Trade Marks Act. Section D covers the law of copyright. Section E briefly canvasses various statutory provisions dealing with misleading or unfair advertising. Section F considers the relevant differences between non-incorporated and incorporated associations as they may bear on the issues in Sections A through E. Particular groups within the Professional Organizations Committee's professional population are mentioned only when they provide some apt illustration of the topic under consideration.

The materials in Sections A - F are no more than quick sketches of the main points of the law in those areas. No attempt has been made to move beyond the rudiments or to supply details, unless this seems to be particularly germane to the question of

protecting the use of professional designations.

The summary which makes up the final section of this chapter attempts to be self-contained. It is hoped that the reader may grasp the relative merits of the mechanisms described in the preceding sections without having to read those sections themselves. In this sense, although the summary appears last, the preceding sections should be treated as appendices which may be consulted for a more general explication of the essentials in each area of the law.

II.A Statutory protection of title

A number of voluntary professional groups or sub-groups in Ontario are subject to provincial statutes which provide for the exclusive use of particular designations by their members. In some cases these statutes originated as private members' bills constituting acts of incorporation (e.g. The Society of Industrial and Cost Accountants of Ontario Act, S.O. 1941, c. 77). In other cases associations have been created by or placed under public statutes (e.g. The Psychologists Registration Act, R.S.O. 1970, c. 372).

On the whole, these statutes are fairly uniform in their methods of providing for the protection of titles: typically, one provision defines the designations which are subject to exclusive use and a second provision renders it a summary offence for non-members to hold themselves out to the public under such titles.

Within this basic format there are variations. Some statutes contain definitions of "holding out" while others do not. Some offence provisions require actual practice of an occupation or the receipt of remuneration in connection with unauthorized use of a title; some again prohibit any possible usage. In addition to the quasi-criminal penalties, some statutes specifically provide for the issuance of compliance/restraining orders. There are large differences between statutes in the levels of maximum and minimum fines or the terms of imprisonment which may be imposed upon conviction. Some statutes provide that all fines collected will be

payable to the association concerned; others are silent on this point, indicating that fines levied will accrue to the Provincial Treasury in the usual manner.

The reader is referred to the comparative legislation summaries prepared for the Professional Organizations Committee for a wider illustration of this phenomenon.¹ In the following, the definition and offence provisions of the statutes governing (a) the Institute of Chartered Accountants of Ontario, (b) the Association of Certified Public Accountants of Ontario, and (c) the Society of Management Accountants of Ontario are reproduced and briefly compared.

(1) (a) Chartered accountants in Ontario are entitled to so designate themselves through membership in the Institute of Chartered Accountants of Ontario (ICAO).² The Institute was founded in 1879 and first incorporated by a Special Act of the Provincial Parliament in 1883. The most recent revision of that Act is The Chartered Accountants Act, S.O. 1956, c. 7.

Section 12 of the Act creates a positive right to carry certain designations. Although the right of title is essentially a remedial one -- consisting in the ability to prevent others from using the designation -- a positive statement is helpful in precluding any possible difficulties arising from inconsistency with other legislation or with the common law interests of others.

Section 12 states:

Every member of the Institute has the right to use the designation "Chartered Accountant" and if he is a Fellow of the Institute he has the right to use the initials "F.C.A." after his name and if he is an Association of the Institute he has the right to use the initials "A.C.A." or "C.A." after his name.

Section 13 then provides as follows:

(1) No person, unless he is a member of the Institute, shall take or use the designation "Chartered Accountant" or the initials "F.C.A.", "A.C.A." or "C.A." either alone or in combination with any other words.

(2) No person, unless he is a member of the Institute, shall take or use any other name, title, initials or description implying that he is a chartered accountant or an incorporated accountant.

(3) No person, unless he is a member of the Institute, shall hold himself out as a chartered accountant.

(4) No person, unless he is a member of the Institute, shall practise as and under the name of a chartered accountant.

(5) Every person who contravenes any of the provisions of this section is guilty of an offence and on summary conviction is liable to a penalty of not more than \$300 for each offence.

(6) For the purposes of this section, an honorary member shall be deemed not to be a member of the Institute.

As framed, the various subsections of s. 13 are relatively wide. For example, "practise as" or "hold himself out as," on first impression are open to an interpretation that would effectively prevent anyone but a member from undertaking the same activities as a CA, since one may make a representation by deed as well as

by word. Section 14 is therefore, it seems, added to preclude such an interpretation. It states:

Nothing in this Act shall affect or interfere with the right of any person not a member of the Institute to practise as an accountant in Ontario, nor with the right of any person, not residing or having an office therein, to use any designation as accountant.

Subsection 13(2) will open the question in each case as to whether the use of a name, title, etc. carries the "implication" that the person is a chartered accountant. It is suggested that the typical consumer of chartered accounting services should be considered in evaluating whether such a confusing implication is present. However, the nature of the hypothetical addressee might be more widely stated. In cases decided under the provisions of The Trade Marks Act,³ attention has been focused on the "man of ordinary intelligence," while under The Combines Investigation Act⁴ courts have considered whether a representation would mislead the "credulous, uncareful person."⁵ The difference may be explained by the criminal nature of the action under the latter Act.⁶ If so, the quasi-criminal penalty provided in the ICAO statute could be subject to the same consideration. This decision should also, it seems reasonable to propose, be decided in light of the consideration that the "right . . . to practise as an accountant" may include the right to identify oneself to the public in any form which does not pose an appreciable risk of confusion in the terms of s. 13(2). It is submitted that a title-protecting provision should not be construed so as to, in effect, hamper the freedom to practise of others.

It is perhaps worth mentioning that "holding out" within the meaning of the ICAO Act does not explicitly require that the offender actually perform services or receive remuneration in association with the improper use of a title. This can be contrasted with the type of provision found in, for example, The Psychologists Registration Act, R.S.O. 1970, c. 372. In s. 11(1) of that Act, it is provided that no person shall "represent himself to be a psychologist" unless registered. (This is subject to a list of exceptions which are not relevant here.) Section 11(2) then restricts the meaning of "represent" as follows:

A person represents himself to be a psychologist when he holds himself out to the public by any title, designation or description incorporating the words "psychological," "psychologist" or "psychology" and under such title, designation or description offers to render or renders services of any kind to one or more persons for a fee or other remuneration.
[emphasis added]

It is also noteworthy that the ICAO statute does not positively provide for the freedom of Ontarian non-members to designate themselves as accountants. In the case of the ICAO that basic right must be inferred. The ICAO Act anticipates the problem of extra-provincial CA's, allowing them to use such a designation in Ontario so long as they do not reside or have an office therein (a provision apparently designed to encourage transferees or those with a relatively permanent establishment in Ontario to join the ICAO) (s..12.). On the other hand, one has to read the subsections of s. 13 of the ICAO Act with some care to discern that non-CA's are free to designate themselves as

accountants in Ontario so long as they do not claim or imply membership in the ICAO by suggesting that they are "chartered" accountants. (In other words, it is the imprimatur "chartered" that is the subject of protection.)

(b) The Certified Public Accountants Association of Ontario (CPAAO) was initially incorporated by Special Act in 1926, under the title of the Association of Auditors and Accountants of Ontario.⁷ In 1936 the name was changed to the CPAAO. In 1962 the CPAAO merged with the ICAO and is now effectively dormant. However, its legal status has been retained, so that members remain entitled to designate themselves as "CPA's." The CPAAO is governed by The Certified Public Accountants Act, R.S.O. 1937, c. 236, as amended. Section 10 of that Act states:

(1) Every member of the Association shall have the right to use the designation "Certified Public Accountant" and may also use after his name the initials "C.P.A." indicating that he is a Certified Public Accountant," and no person shall be entitled to take or use the designation "Certified Public Accountant" or the initials "C.P.A.", or any name, title or description implying that he is a member of the Association unless he is a member in good standing and registered as such.

(2) Any person who contravenes the provisions of subsection 1 shall incur a penalty not exceeding \$25 for each offence recoverable under The Summary Convictions Act.

(3) Every such penalty shall forthwith upon the recovery thereof be paid over by the convicting magistrate to the secretary-treasurer of the Association.

The most obvious distinctions between the ICAO Act and the CPAAO Act are two. First, the CPAAO Act does not include a section positively stating that the right to a protected title shall not be construed so as to restrict the ability of others to practise in the same area. At the present time this is perhaps of little note, given the dormancy of the CPA designation in any case, and the fact that practice as a "public accountant" is subject to mandatory licensure under The Public Accountancy Act, R.S.O. 1970, c. 373.⁸ Second, the Act provides that fines will be payable to the CPAAO's coffers.

This latter feature was criticized in the Report of the Commission of Inquiry into Civil Rights (the "McRuer Report").⁹

The words of that Ontario Commission bear repeating:¹⁰

The sharing of fines with informers or prosecutors and the payment of fines to boards, tribunals or other bodies for their own purposes is wrong in principle. No person or body other than the State which represents the entire population should have a pecuniary interest in securing a conviction. Laws exist for the protection of the State and its members and all penalties recovered for breaking the law should be paid to the State.

It is possible that provisions in the nature of s. 10(3) were once thought to be desirable for the dual reason that they encouraged associations to police unauthorized activities through the means of an incentive which could help to defray at least the costs of so doing and perhaps even the general costs of maintaining the organizations. However, some doubt can be expressed as to whether professional bodies should be so "interested" in the prosecution of

unauthorized acts, especially since an aggressive policy in this area could be used as a means of harrassing or otherwise discouraging competitors in their field.¹¹ Of course, the deterrent element of a fine is not enhanced by its being paid to an association. The McRuer Report concluded:¹²

We, therefore, recommend that all fines imposed for the contravention of all laws passed under the authority of the Provincial Legislature should be paid in full to the Province, and that no person acting as informer, prosecutor, or in any other capacity should be entitled to any share of the portion levied.

(Particularly where the potential sum involved is \$25, it must be remembered that the McRuer criticism is one of principal and not based on evidence that such abuses are occurring.)

(c) The Society of Management Accountants of Ontario (SMAO)¹³ was initially incorporated under a private member's bill in 1941, as the Society of Industrial and Cost Accountants. Despite the recent change in the name of the association, members continue to identify themselves officially as "Registered Industrial Accountants." Section 11 of The Society of Industrial and Cost Accountants Act, S.O. 1941, c. 77, as amended, states:

(1) Every registered member of the Society shall have the right to use the designation "Registered Industrial and Cost Accountant" and may use after his name the initials "R.I.A.", indicating that he is a registered industrial and cost accountant.

(2) Every person taking or using the designation "Registered Industrial and Cost Accountant" or

the initials "R.I.A." or any name, title or description implying that he is a registered member of the Society, unless authorized so to do, shall be guilty of an offence and shall upon conviction incur a penalty not exceeding \$25 for each offence.

(3) The penalty imposed under subsection 2 may be recovered under The Summary Convictions Act and shall be paid over forthwith by the magistrate to the Society.

It will be seen that s. 11(3) of the SMAO Act is similar to s. 13(3) of the CPAAO statute. The SMAO Act shares with the ICAO statute the feature that it contains a general saving provision. Section 12 states:

This Act shall not affect or interfere with the right of any person from carrying on business in Ontario as a cost accountant, or industrial accountant, or professional accountant, and from designating himself as such.

The wording of this section seems more satisfactory than that of s. 14 under the ICAO Act, insofar as it clarifies the right of non-members to designate themselves in some other way. (Again, it is the imprimatur rather than the generic term which is protected.)

None of the foregoing statutes provide for either minimum penalties or terms of imprisonment.¹⁴ No distinction is made in terms of maximum penalties between first and subsequent offences.¹⁵ The maximum fine under the ICAO Act was changed to \$300 from \$25 in 1956,¹⁶ whereas the penalties provided for the CPAAO and SMAO Acts have never been altered. There is also no explicit indication of the right of the bodies

to obtain injunctive relief against the unauthorized use of their titles. This can be contrasted with a provision such as that found in s. 88 of The Health Disciplines Act, S.O. 1974, c. 47, as amended, for registered nurses and nursing assistants, which enacts:

(1) Where it appears to the College [of Nurses] that any person does not comply with any provision of this part or the regulations, notwithstanding the imposition of any penalty in respect of such non-compliance and in addition to any other rights it may have, the College may apply to a judge of the High Court for an order directing such person to comply with such provision, and upon the application the judge may make such order or such other order as the judge thinks fit.

(2) An appeal lies to the Supreme Court from an order made under subsection 1.

Prosecutions by way of summary proceedings are initiated through the laying of an "information." This requires someone to appear before a justice of the peace or magistrate, willing to swear that he has knowledge, or reasonable and probable grounds to believe, that an offence has transpired. If the J.P. or magistrate is satisfied of this condition, a summons will issue. The person swearing the charge need have no personal interest in the event.

Once the charge is laid, the proceedings may take one of two courses. The actual case may be prosecuted by the person who initiated the proceedings. Alternatively, the Crown may step in and take over the conduct of the case. This step is in the discretion of the Crown. Similarly, the Crown may step into

proceedings that have already commenced in order to enter a stay.¹⁷

(2) It seems safe to say that many of the Acts awarding a protected right to use a particular title have been dealt with by the legislature in a largely ad hoc manner. This appears to be especially so for the "private" statutes. Accordingly, perhaps, there seems to be no underlying coherent rationale for the wide variations between their definition and offence provisions.

This is not to allege that certain issues have not been consistently regarded in the process of passing such acts of incorporation for professional associations. On the other hand, it is evident that no attempt has been made to relate the various title-protecting provisions to any uniform model from which they could be adapted for particular situations.

It is tempting to theorize that such features as the scope of the offence or the severity of the penalty are correlated with such factors as the extent to which the unauthorized use of a title may prejudice potential consumers. Undoubtedly, some such effect may occur as a natural product of the importance which the legislators themselves attach to the character of the services rendered by the members of a given association. Presumably, the greater the need to protect consumers --which is a fundamental rationale for these statutes in the first instance-- the stronger will be the impetus to ensure that the definitions of unauthorized

usage will be comprehensive or that the penalties provided will be effective deterrents. The difference between a \$2,000 and \$25 maximum fine (as occurs between registered nurses and R.I.A.'s¹⁸) might be rationalized in this way. It cannot, however, be asserted that any such policy has in fact been regarded in the preparation and passage of these statutes.

Footnotes

1. On file with the P.O.C.
2. For a general description of the ICAO see Sievers, The Regulation of the Practice of Accounting in Ontario: A Descriptive Profile (P.O.C. Working Paper, 1977) at 77-97. (Hereafter referred to as "Accounting Profile.")
3. See p. 62, n. 15, infra.
4. See p. 82, infra.
5. See R. v. Imperial Tobacco Products, [1971] 5 W.W.R. 409, 22 D.L.R. (3d) 51, 4 C.C.C. (2d) 423 (Alta. S.C.), Clairol International v. Thomas Supply and Equipment Co. Ltd., [1968] 2 Ex. C.R. 552, 38 Fox Pat. C. 176, 55 C.P.R. 176, and Bain, "The Law Affecting Comparative Advertising," 32 U. of T. Faculty of Law Review (1974) 109 at 110.
6. Bain, op. cit. at 110.
7. See Accounting Profile at 37-45 et passim.
8. Ibid. at 57-76.
9. See especially Report No. 1, Volume 3 of the Royal Commission Inquiry into Civil Rights (Toronto, 1968).
10. Ibid. at 913-14.
11. This would seem to be one of the considerations behind Recommendation No. 309 of the Report of the Committee on the Healing Arts (Toronto, 1970) Volume 3 at 42:

"That the obligation to police the prohibition against such practice by persons not registered under the Medical Act ought to be removed from the College of Physicians and Surgeons of Ontario and transferred to the Crown Attorney for the county in which the offence is alleged to have been committed; similar changes should be made in respect of prosecutions for unauthorized practice under the Dentistry Act, the Optometry Act and the Pharmacy Act."
12. Op. cit., n. 9, supra., at 914.
13. See Accounting Profile at 98-110.
14. For example, a possible term of six months imprisonment is provided for in s. 29(5) of The Surveyors Act, R.S.O. 1970, c. 452.

15. Compare, for example, s. 89(2) of The Health Disciplines Act, S.O. 1974, c. 47, as amended.
16. Per: An Act to Reconstitute the Institute of Chartered Accountants of Ontario, S.O. 1956, c. 7
17. See, for a general description, Salhany, Canadian Criminal Procedure (Toronto, 1975).
18. Compare s. 89(2) of The Health Disciplines Act (op. cit., n. 15 supra.) and s. 11(2) of the SMAO Act, pp. 21-22, supra.

II.B Passing Off

The civil action traditionally known as "passing off" is a development of the common law relating to unfair competition. One writer has concisely defined the type of wrong involved as:¹

. . . the making of some false representation to the public, or to third persons, likely to induce them to believe that the goods or services of another are those of the plaintiff.

Essentially, passing off is a form of misrepresentation consisting of the unauthorized appropriation of another's commercial credit, goodwill or reputation. Passing off,

. . . purports to protect only the plaintiff's "property right" in his goodwill, which does not involve any restraint on competition except to prohibit competitors from gaining an unfair advantage at his expense by confusing his potential customers.

In other words, the common law recognizes the interest of a person who uses some name, mark, packaging guise or other sign as a means of distinguishing his product in the market place. It is not the goods/services themselves which are distinguished, but the source of the goods or services. The essence of passing off lies in the attempt by some other person to mislead consumers into believing that they are buying goods which originated with one source when they are not.³

The common law of trade marks is thus a constituent part of the broader law of passing off. The wrong can occur in

relation to any distinguishing mechanism, since it lies, not in the nature of the sign which is used to distinguish the goods, but in the defendant's action in inducing confusion in the minds of consumers.⁴

At the present time, an action for passing off may be brought either at common law or under s. 7 of the Trade Marks Act (infra). The latter is basically a statutory restatement of the common law, although it does introduce one important alteration in the scope of the action. Part (1) following briefly describes the elements of the common law action. Part (2) raises some problems with the scope of the action. Part (3) examines s. 7 of the Trade Marks Act. Part (4) notes the remedies available, and Part (5) addresses itself specifically to the efficacy of the passing off action in relation to the protection of professional designations.

(1) There are basically three necessary and interrelated elements which the successful plaintiff in a passing off action must prove.

(a) It is fundamental that the plaintiff must demonstrate that he has acquired some recognizable form of commercial reputation, credit or good will in the use of a mark, name, etc. in association with his goods. The plaintiff must show that the mark or name serves to distinguish his product, either because the sign is inherently adapted to distinguish (i.e., inherently distinctive) or has in fact come to be distinctive in the market

place.⁵

A plaintiff, then, can acquire a peculiar interest in the use of a particular sign by (i) first adoption of the sign and (ii) user. It must be demonstrated that the mark or name has been consistently used for the purpose of identifying and setting off the product as coming from a particular source, thereby gaining visibility and reliance in the course of trade. At the time of the action the plaintiff may be required to show that his name or mark has not lost this distinctive quality, through abandonment, by persistent unopposed use by others or because the plaintiff has allowed the sign to become in effect a merely generic or descriptive term in common usage.⁶

In assessing whether a given plaintiff can and has acquired a unique interest in the use of a sign, the court will have regard for the general public interest in unfettered competition. In addition, it has long been the law that generic or merely descriptive terms may be used by all, as may words which are common to the trade.⁷ Since, however, the essence of the plaintiff's interest lies in actual distinctiveness, it is possible to develop an exclusive interest in the use of a merely descriptive or generic term through long and exclusive use of the term in association with a particular product. The doctrine of "secondary meaning" recognizes that general signs may become, in actual effect, quite specific in their connotations.⁸

Strictly speaking, it is not essential that the plaintiff demonstrate actual consumer reliance. Evidence that the plaintiff was the first to adopt a sign and has subsequently used it so as to make it distinctive in the course of trade may suffice. On the other hand, evidence of actual consumer reliance will assist in demonstrating actual distinctiveness.

(b) Secondly, it must be shown that the defendant has acted in some way which is calculated to mislead the public. This may involve the actual copying of a plaintiff's distinguishing sign, or the adoption of one so closely similar in form and content as to be likely to deceive or confuse. (The person who simply substitutes his own goods when those of another are requested will also be liable).

The likelihood of confusion is a question of fact for the court in each case. In assessing whether confusion is probable, the court should look to the signs as a whole and the circumstances in which they are used. The concern is with probable, not actual, confusion, based on the visual and auditory quality of the signs and the context in which they are displayed.⁹ One commentator has suggested that the test involves looking at the two signs from the perspective of whether their use in the same market is likely to deceive the "casual and unwary" consumer, quoting Lord Macnaghten's dictum: "Thirsty folk want beer, not explanations."¹⁰ It will be more realistic to expect that a modern court will ask whether confusion could occur in the mind of the ordinary purchaser.¹¹

It has even been suggested that the hypothetical addressee should be the user of the particular product, acting with the degree of caution usually exercised in such transactions.¹² Thus in one case¹³ distributors from the Champagne region were able to restrain the use of the mark "Spanish Champagne" by another. It was felt that, while the purchaser of vintage port would be, on the average, quite sophisticated, a great deal of champagne was bought by persons who could not be reasonably expected to make fine distinctions.

It is also generally said that passing off can only occur at common law when the rival products involved are of the same nature, or at least the same general class. In other words, the plaintiff and defendant must be in competition.¹⁴ Indeed it was once said that passing off required that the defendant had represented his goods to have been actually produced or distributed by the plaintiff.¹⁵ The distinction was made that passing off involved misleading consumers as to the origin of the goods rather than as to the qualities they possessed. It remains the case that a claim that products have qualities which they do not in fact have while the plaintiff's do will not be construed as passing off (though it may be the subject of an unfair advertising prosecution).¹⁶ In contrast, the origin concept is now more widely applied, so as to include representations which suggest that the plaintiff has been in any manner connected with their manufacture, supply or distribution.¹⁷ The requirement that the goods in question be of the

same nature or in direct competition is also no longer strictly construed. Rather, the question of whether such conditions are present is seen as going to the larger question of the likelihood of confusion. Direct competition or similarity of product will influence the court's willingness to find that confusion is probable, but it is also now seen as possible for the plaintiff's commercial reputation in a sign to extend beyond his particular goods, being so widely established that almost any use or imitation of it may be a source of confusion.¹⁸ Although there is no Canadian case on point, U.S. and English cases have recognized the concept of "dilution" of the plaintiff's mark through use of the sign in markets other than that in which the plaintiff is directly involved.¹⁹

Finally, it seems to be settled law that no question of intention to mislead is involved. Innocent and unconscious passing off may be restrained or compensated as readily as deliberate fraud, although it is also said that proof of the latter will influence the court on the question of whether the defendant has succeeded in creating potential confusion.²⁰

(c) The third element required is that the plaintiff must persuade the court that the defendant's confusing practice entails some appreciable risk of prejudice or detriment to the plaintiff's commercial position. It is no longer strictly necessary to prove actual damage (for instance, in the form of diverted sales or a

decline in reputation). Naturally, the court will take note of such evidence, which may well influence its choice of remedy and the level of damages awarded. But a demonstration that the first two elements are present is sufficient for the court to infer that harm will occur. The stronger the plaintiff's claim to an interest in the exclusive use of a sign and the greater the likelihood of confusion, the stronger will be the inference of significant harm.²¹

(2) The scope of application of the passing off action has been progressively widening, but some doubts remain as to its full extent.

It has already been noted that at one time the plaintiff and defendant were required to be engaged in direct competition. This concept has been largely abandoned, being absorbed instead into the inquiry as to whether confusion is likely to occur. The law has been extended to cover spurious claims of sponsorship, recommendation, endorsement and so on. However, references to the requirement of direct competition or similarity of goods as if it were a separate element of the action still linger in the case law.²²

In its origins, the law of passing off is intimately related to the activities of producers and traders in goods or wares. At one time, it was apparently considered that suppliers of services could not avail themselves of the law's protection at all, and the assertion is still made that there is no common law of

trade marks for services.²³ Apart from the sub-group of "trade marks", however, an expansion of the action of passing off has accompanied the growth in importance of the services sector in the economy, so that it is now possible to acquire a commercial interest in any other form of sign which serves to distinguish the source of the plaintiff's services.

Finally, it should be noted that there remains some question as to whether the interest of a provider in the commercial goodwill that attaches to his distinguishing sign is a form of property. There are cases on both sides of this issue, and it may be best to refer to the plaintiff's right simply as "quasi-proprietary."²⁴

(3) Section 7 of the Trade Marks Act, R.S.C. 1976, c. T-10 contains two provisions which basically encompass the common law of passing off, thereby giving the Federal Court concurrent jurisdiction with the provincial courts in this area. Section 7(b) states that no person shall,

direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

Section 7(c) prohibits the actual substitution of goods/services, by providing that no person shall,

pass off other wares or services as and for those ordered or requested;

Section 7(b) was explicated by Gibson, J. in Old Dutch Foods Ltd. v. W.H. Malkin Ltd. in terms which are identical to those applied at common law:²⁵

The plaintiff must prove that what a defendant has done has resulted in confusion to the public in the plaintiff's market, as to the origin or source of the "wares, services or business." Secondly, such plaintiff must prove what sometimes has been described as an invasion of his exclusive right to the trade mark or get up, and that it is more probable than not that confusion has been caused. Thirdly such plaintiff must prove that such breach caused or was likely to cause him damage.

Proceedings under s. 7 rather than at common law have one distinct advantage. Section 7(b) merely requires that confusion be likely as to the goods/services "of another". This wording is taken as removing any remaining restraint on the availability of the action based on the fact that the parties are not in competition, so that s. 7(b) has a clarity which the often obscure cases on this point at common law lack.²⁶ Of course, as at common law, the similarity of the products and the presence of direct competition may influence a finding of probable confusion. But it has been explicitly held under s. 7(b) that "such confusion leading to deception might at times occur even where the services are not of the same general class."²⁷

Parenthetically, it should also be mentioned that s. 7(e) of the Trade Marks Act provides that no person shall,

do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

The meaning of this section has been the subject of much uncertainty. One writer who has reviewed the cases indicates that s. 7(e) has so far been applied mainly to instances of breach of confidence or contract.²⁸ It has been suggested that s. 7(e) is designed to give the Federal Court jurisdiction to grant relief as defined in the Trade Marks Act when a breach of contract or some other tort has been shown (although the Federal Court itself may not have the jurisdiction to actually find the breach or tort).²⁸ In S. and S. Industries v. Ross Frederick Rowell it was said that s. 7(e) is not confined to the prohibition of illegal acts.²⁹ In Vapour Canada v. MacDonald, Jackett, C.J. provided the following elucidation:³⁰

An act or practice in the carrying on of an industrial or commercial operation is prohibited if it would be unacceptable to an honest businessman in Canada. Apart from very exceptional circumstances, . . . that involves breach of a law either civil or criminal because any such act or practice would . . . be unacceptable . .

The meaning and effect of s. 7(e), both standing alone and in relation to the other subsections of s. 7, remains to be clarified. For the purposes of this discussion, it must be said that s. 7(e) is of little relevance, since subsections (b) and (c) seem to be sufficiently wide in their scope to encompass any action involving intrusion upon the interest of a party in the use of a distinguishing sign.

(4) The remedies available to the successful plaintiff in an action for passing off are basically threefold: injunctive

relief, damages and/or an equitable accounting of profits.

Section 53 of the Trade Marks Act empowers a court of competent jurisdiction to grant those forms of relief, which are identical to the remedies available at common law.

(a) Injunctive relief will be granted on the basis that is generally applied in other areas of the law. The court must find both that the plaintiff's right has been intruded upon, and that repetition of the offending act(s) is likely to occur. An injunction may also be obtained quia timet: that is, on strong evidence that the defendant is about to, or plans to, invade the plaintiff's right.³¹

It is also possible to obtain an interlocutory injunction before the trial of the issue. In such cases, the plaintiff must show that he will likely sustain irreparable damage in the interim if the defendant is not immediately restrained. As in the case of a permanent injunction -- and although intention is not essential to the wrong of passing off -- convincing evidence of the deliberateness of the defendant's behaviour will influence the court in the plaintiff's favour.³²

(b) It has been mentioned that damages need not be actually proven in an action for passing off. The level of damages awarded will, however, be effected by a number of factors -- evidence of actual harm, the degree of probability that confusion has occurred in the minds of consumers, and the deliberateness of the defendant's

behaviour. It is generally said that innocent (unaware) passing off should be the subject of nominal damages only, although proof of actual harm may alter this rule of thumb. On the other hand, deliberate fraud may found an award of punitive damages, or at least increase the sum of the damages awarded at large.³³

(c) It is also possible for the aggrieved plaintiff to seek an equitable accounting of the profits which the defendant has derived from his offending behaviour. It is generally the case that an accounting for profits may only be sought as an alternative to, rather than in addition to, general damages.³⁴ Moreover, it is sometimes suggested that an accounting is only available where there is sufficient proof of the deliberateness of the defendant's actions. Even if this is not taken to be the case, it seems that the knowledge of the defendant will effect the time of computation of profits. It is suggested that the defendant who was unaware that he was invading the plaintiff's right or thought that he was entitled to use the given sign will only be liable for profits gained after the date on which he became aware of the invasion, while the defendant who had such knowledge will be accountable for all profits accruing since the commencement of the offending activity.³⁵

(5) The availability of the passing off action as a means of discouraging the unauthorized adoption of professional designation is subject to some general problems.

These difficulties lie partly in the very nature of professional designations. To begin with, it is assumed that most groups adopt designations partly as informational signs of the area of competence which their members profess to operate in. An inherent difficulty here is that the more descriptive or generic the term, or the more common the use of the term is in the course of the trade, the more difficult it will be to secure exclusive interest in its use. For example, it seems certain that terms such as "technologist", "engineer", "accountant" and so forth can not be exclusively appropriated. In addition, the more apprently descriptive the designation, the more likely it will be that an attempt to exclude others from its use will be attacked on the grounds that the user is attempting to distinguish the kind or quality of services offered. Passing off actions only protect the use of terms to distinguish the source or origin of the services.

Of course, the sign in question must be regarded as a whole. It is possible for a sign to contain elements which individually would not be proper subjects of protection, while taken in combination they may satisfy the requirement of distinctiveness. Moreover, it is possible for even the most common and descriptive terms to acquire actual distinctiveness through the development of a strong secondary meaning. (It must also be remembered that it is possible for a sign to lose its distinctiveness if the user(s) allow it to come to stand for a description of the services offered rather than a sign that they originate from a particular person). In general, it seems reason-

able to suggest that while professional groups may aspire to the exclusive use of broad, generic titles, protection is more likely to be available to designations which are narrowly specific and non-descriptive in meaning.

Another potential problem may be obviated by s. 7(b) of the Trade Marks Act. The integrity of a designation as a distinctive sign may be damaged by use of the same or a confusingly similar title on the part of persons outside of the market in which a group's members are involved, as well as by persons working in the same field. This would seem to be especially so where both the nature of the services offered and the clientele are broad (as opposed to being highly specialized services offered to a narrow group of consumers). Since the requirement that plaintiff and defendant be in direct competition for the same consumers is clearly removed by the wording of s. 7(b) (supra.) there may be less difficulty here than that which might be encountered in an action founded at common law. Still, "dilution" of a sign is not a well-established concept in the Canadian jurisprudence on passing off, and the burden of demonstrating the probability of harmful confusion in such cases is bound to be heavy.

Aside from the question of whether a quasi-proprietary interest in the use of a professional title can be acquired at all, a further difficulty will present itself. This is the matter of who should sue. Assuming that the professional association

is incorporated -- as most major groups are³⁶ -- it will probably be preferable for the corporation to sue (although one member could perhaps be used as a "test" case).

Most passing off cases involving services have concerned commercial service providers rather than professional associations. However, such associations have been able to bring suit (and succeed) in a number of instances. Courts have accepted that an association has a genuine interest in preventing dilution or devaluation of the titles granted to its members. (Having an interest which may be financially compensated is of course not incompatible with non-profit status so long as there is no distribution of any monetary damages to the corporation's membership.) For examples of actions where professional societies have succeeded in restraining the unauthorized use of their titles or other claims of affiliation see Society of Accountants of Edinburgh v. Corp. of Accts. Ltd. (1893), 30 Sc. L.R. 677, Institute of Electrical Engineers v. Emerson (1950), 67 R.P.C. 167 and British Medical Assn. v. Marsh (1931), 48 R.P.C. 565.

It is also possible that only the individual member(s) would sue, either alone or in a representative capacity on behalf of all other members. It is possible for a number of discrete individuals to assert a common interest in the use of a trade name, guise, etc., so long as they establish a greater right to

its use than the defendant has. The rules applying to representative actions are, though, quite strictly construed by the courts.³⁷ Moreover, the individual members' resources are likely to be significantly smaller than those of the association itself, making the costs and risks of an action more difficult to bear. It seems the association could be able to place some of its resources at the disposal of the individual plaintiff(s).

The issues raised above cannot be resolved by this writer. In particular, it is not possible, without significant experience in the law of passing off, to predict whether a given professional title will or will not be a proper subject of protection. It does seem reasonable to conclude, however, that the action for passing off will be at best an unwieldy mechanism.

Footnotes

1. Prosser, Prosser on Torts, 3rd ed. (St. Paul, Minn.: 1964) at 982. (Hereafter referred to as "Prosser".)
2. Fleming, The Law of Torts, 4th ed. (Toronto: 1971) at 631. (Hereafter referred to as "Fleming".)
3. Ibid, at 626; Prosser, at 982.
4. Ibid.
5. Fox, The Canadian Law of Trade Marks and Unfair Competition (Toronto: 1972) at 496 ff. (Hereafter referred to as "Fox").
6. Ibid.
7. Fleming, at 629; Fox, at 570. See, e.g., Office Cleaning Service v. Westminster Office Cleaning Assn., [1944] 2 All E.R. 269 (C.A.)
8. Fleming at 692; Fox, at 573 ff. See, e.g., Birmingham v. Powell, [1897] A.C. 710 (C.A.)
9. Fleming, at 626-627; Fox, at 497 ff.
10. Fleming, at 627 citing Montgomery v. Thompson, [1891] A.C. 217 (H.L.) at 225.
11. Fleming, at 627.
12. Prosser, at 983.
13. Bollinger v. Costa Brava Wine (No. 2), [1961] 1 W.L.R. 277.
14. Fox, at 498.
15. Fleming, at 628.
16. See pp. 76 ff. ; Fleming, at 630.
17. Fleming, at 628.
18. Ibid.
19. Bain, "The Law Affecting Comparative Advertising," 32 U. of T. Faculty of Law Review (1974) 109.
20. Fleming, at 626-627.
21. Fleming, at 627.

22. Fox, at 498 ff.
23. Ibid., at 18
24. See, e.g. Spalding v. A.W. Gamage (1915), 32 R.P.C. 273; Alastair Sim v. H.J. Heinz, [1956] R.P.C. 75.
25. Old Dutch Foods Ltd. v. W.H. Malkin Ltd.
26. Fox, at 335 ff.
27. Op. cit., n. 19, ante, at 117. The Noshery v. Penthouse Motor Inn (1969), 61 C.P.R. 207 at 214.
28. Op. cit., n. 19 ante. at 111.
29. S. and S. Industries v. Ross Frederick Powell, [1966] S.C.R. 419, 56 D.L.R. (2d) 501.
30. Vapour Canada v. MacDonald et. al. (1972), 33 D.L.R. (3d) 434, 8 C.P.R. (2d) 15, [1972] F.C.R. 1156 (Fed. C.A.), affirming 6 C.P.R. (2d) 204 (Fed. Ct. Tr. Div.). See also Consolidated Textiles v. Central Dynamics et. al., [1974] 2 F.C.R. 814, 18 C.P.R. (2d) 1 (Fed. Ct. Tr. Div.).
31. Fox, at 641 ff.
32. Ibid., at 637 ff.
33. Fleming, at 626. Draper v. Trist, [1939] 3 All E.R. 513.
34. Fox, at 647 ff.
35. Ibid.
36. See the Appendix to this paper.
37. Watson, Borins and Williams, Canadian Civil Procedure, (Toronto: 1973).

II.C Registered Trade Marks

The law of trade marks is an outgrowth of the common law, constituting one part of the law of passing off. It is possible to acquire rights in a trade mark and to protect that right, either at common law or under the general unfair competition provision or the Trade Marks Act R.S.C. 1970, c. T-10.¹

The Trade Marks Act, however, brought into existence a system of registration and a number of remedies in respect of the infringement of a registered trade mark. Part (1), following, concentrates on registered trade marks, mentioning the common law only by way of comparison when the statutory law makes an appreciable departure. Part (2) refers specifically to the use of a registered trade mark by one of the paraprofessional designating associations in the Professional Organizations Committee's professional population.

(1) "Trade Mark" is generally defined by s. 2(t) of the

Trade Marks Act:

"trade mark" means

- (a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others,
- (b) a certification mark,
- (c) a distinguishing guise, or
- (d) a proposed trade mark

This definition differs from that of common law in three respects. One is that trade marks do not exist in relation to services of common law (although names, signs, etc. may be the subject of passing off actions).² The second is that, at common law, a trade mark can only be said to exist where it in fact distinguishes the trader's product, either because the mark is inherently distinctive or through the acquisition of secondary meaning.³ By contrast, s. 2(b) includes marks used "for the purpose of" distinguishing products, suggesting that (at least in the general definition) a mark may become a trade mark partly through the intention of the trader.⁴ Lastly, at common law trade mark rights are gained through first adoption and exclusive user of the mark. This remains the case under the Act, but an additional category of "proposed" trade marks is added. It is possible to reserve a mark prior to actual use, although registration will lapse if it is not followed by adequate user.⁵ "Adoption" and "use" are defined in the Act by deeming provisions:

3. A trade mark is deemed to have been adopted by a person when he or his predecessor in title commenced to use it in Canada or to make it known in Canada or, if he or such predecessor had not previously so used it or made it known, when he or such predecessor filed an application for its registration in Canada.

4. (1) A trade mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of such wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

(2) A trade mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of such services.

It is especially relevant to the topic of professional designations to note that "trade mark" includes a special category of "certification marks":

2. In this Act

"certification mark" means a mark that is used for the purpose of distinguishing or so as to distinguish wares or services that are of a defined standard with respect to

- (a) the character or quality of the wares or services,
- (b) the working conditions under which the wares have been produced or the services performed,
- (c) the class of persons by whom the wares have been produced or the services performed, or
- (d) the area within which the wares have been produced or the services performed, from wares or services that are not of such a defined standard;

Essentially, a certification mark is a sign which indicates that the goods/services in question have met a defined standard (whatever it may be). Ownership of certification marks is subject to a special rule, embodied in s. 2(h) and s. 23(1), respectively:

"owner" in relation to a certification mark means the person by whom the defined standard has been established;

A certification mark may be adopted and registered only by a person who is not engaged in the manufacture, sale, leasing or hiring of wares or the performance of services such as those in association with which the certification mark is used.

The owner of a certification mark may license others to use the mark under s. 23(2):

The owner of a certification mark may license others to use the mark in association with wares or services that meet the defined standard and the use of the mark accordingly shall be deemed to be use thereof by the owner.

The category of registrable trade marks is narrower than the general definition of trade mark provided in s. 2(t), According to s. 12(1):

Subject to section 13, a trade mark is registrable if it is not

- (a) a word that is primarily merely the name or the surname of an individual who is living or has died within the preceding thirty years;
- (b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French languages of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;
- (c) the name in any language of any of the wares or services in connection with which it is used or proposed to be used;
- (d) confusing with a registered trade mark;
- or
- (e) a mark of which the adoption is prohibited by section 9 or 10.

Section 9 prohibits the adoption of a trade mark which either consists of, or so closely resembles as to be mistaken for one or more of a number of signs and symbols which suggest royal patronage, governmental affiliation, etc. Section 10 states:

Where any mark has by ordinary and bona fide commercial usage become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin

or date of production of any wares or services, no person shall adopt it as a trade mark in association with such wares or services or others of the same general class or use it in a way likely to mislead, nor shall any person so adopt or so use any mark so nearly resembling such mark as to be likely to be mistaken therefor. 1952-53, c. 49, s. 10.

The meaning of "confusion" in s. 12(1)(d) is supplied by s. 6 of the Act (see p. 55). The main thrust of s. 12(1)(b) and (c) and s. 10 is that a trade mark right will not lie in words which are merely generic or descriptive by their nature, or have come to assume such a character in ordinary usage.⁶ "Deceptively misdescriptive" signs, on the other hand, may be quite specific, but are prohibited because the mark is misleading as to the nature and quality of the product in association with which it is used. Non-deceptive "misdescriptive" words may be eligible for registration.⁷

It should be noted as well that the doctrine of secondary meaning⁸ is incorporated by s. 12(2), which enacts:

A trade mark that is not registrable by reason of paragraph (1)(a) or (b) is registrable if it has been so used in Canada by the applicant or his predecessor in title as to have become distinctive at the date of filing an application for its registration.

Thus, marks which are unregistrable may be entered on the register if they have become "distinctive" per s. 2(f):

"distinctive" in relation to a trade mark means a trade mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so to distinguish them;

Applications for registration are made to the Registrar of Trade Marks in the Federal Ministry of Consumer and Corporate Affairs. The Registrar must first determine whether the mark satisfies both the general definitions and s. 12, then whether the mark falls outside a further prohibition in s. 16(1) against the registration of marks which are "confusing" with trade names or trade marks (including unregistrable marks):

Any applicant who has filed an application in accordance with section 29 for registration of a trade mark that is registrable and that he or his predecessor in title has used in Canada or made known in Canada in association with wares or services is entitled, subject to section 37, to secure its registration in respect of such wares or services, unless at the date on which he or his predecessor in title first so used it or made it known it was confusing with

- (a) a trade mark that had been previously used in Canada or made known in Canada by any other person;
- (b) a trade mark in respect of which an application for registration had been previously filed in Canada by any other person; or
- (c) a trade name that had been previously used in Canada by any other person.

This prohibition is not directly policed by the Registrar.

Rather, all applications for registration are published in the Canada Gazette, and affected parties are given the right to object to a proposed registration. Section 17(1) provides:

No application for registration of a trade mark that has been advertised in accordance with section 36 shall be refused and no registration of a trade mark shall be expunged or amended or held invalid on the ground of any previous use or making known of a confusing trade mark or trade name by a person other than the applicant for such registration or his predecessor in title, except at the instance of such other person or his successor in title, and the burden lies on such other person or his successor to establish that he had not abandoned such confusing trade mark or trade name

at the date of advertisement of the applicant's application.

Where no objection is filed within a set time the Registrar must accept the application (s. 38).

The validity of a registration may also be challenged generally whether in an initial objection or any subsequent court proceedings, under s. 18(1), which states (in part):

- (1) The registration of a trade mark is invalid if
 - (a) the trade mark was not registrable at the date of registration;
 - (b) the trade mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced; or
 - (c) the trade mark has been abandoned;

The acquisition of "distinctiveness" by the time of the challenge makes the impropriety of an original registration invalid.

Moreover, s. 17(2) applies to make a trade mark registration which remains unopposed for 5 years from the date of registration conclusive against challenges under s. 17(1).

In considering an application and/or an objection the Registrar, as well as any subsequent court, must consider the trade mark as a whole. A registrable trade mark may consist of words (or other symbols) which would be registrable standing alone in combination with other words which would not.⁹ As a hypothetical: in the mark "X.Y.Z.", "Y" and "Z" might be unregistrable independently from "X" and from each other. In such cases, s. 34 provides:

The Registrar may require the applicant for registration of a trade mark to disclaim the right to the exclusive use apart from the trade mark of such portion of the trade mark as is not independ-

ently registrable, but such disclaimer does not prejudice or affect the applicant's rights then existing or thereafter arising in the disclaimed matter, nor does such disclaimer prejudice or affect the applicant's right to registration on a subsequent application if the disclaimed matter has then become distinctive of the applicant's wares or services.

It has already been mentioned that the owner of a certification mark may license its use by others. For registered trade marks, the Act provides a system of "registered use" in s. 49, which states:

(1) A person other than the owner of a registered trade mark may be registered as a registered user thereof for all or any of the wares or services for which it is registered.

(2) The use of a registered trade mark by a registered user thereof in accordance with the terms of his registration as such in association with wares or services manufactured, sold, leased, hired or performed by him, or the use of a proposed trade mark as provided in subsection 39(2) by a person approved as a registered user thereof, is in this section referred to as the "permitted use" of the trade mark.

(3) The permitted use of a trade mark has the same effect for all purposes of this Act as a use thereof by the registered owner.

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(11) Nothing in this section confers on a registered user of a trade mark any transferable right to the use of such trade mark.

Status as a registered user confers on that person the power to require the trade mark's owner to pursue the remedies available for infringement. Section 49(4) declares:

Subject to any agreement subsisting between the parties, a registered user of a trade mark may call upon the owner thereof, and, if the owner refuses or neglects to do so within two months after being so called upon, the registered user may institute proceedings for infringement in his own name as if he were the owner, making the owner a defendant but an owner so added as defendant is not liable for any costs unless he takes part in the proceedings.

This may be contacted with the provisions concerning certification marks. It is provided that their use may be licensed by the owner himself -- presumably without the need to register the users. Section 23(3) states:

The owner of a registered certification mark may prevent its use by unlicensed persons or in association with any wares or services in respect of which such mark is registered but to which the licence does not extend.

Section 23(4) anticipates the problem that a certification mark may be owned by an unincorporated association of individuals (or a group of members smaller than the entire association), which cannot sue in its own name. It is, therefore, provided:

Where the owner of a registered certification mark is an unincorporated body, any action or proceeding to prevent unauthorized use of such mark may be brought by any member of such body on behalf of himself and all other members thereof.

This section seems designed to avoid the difficulty which generally attends an attempt to frame a representative action.

The Trade Marks Act contains causes of action that are applicable only to validly registered trade marks.

Section 19 defines the effect of registration:

Subject to sections 21, 31 and 67, the registration of a trade mark in respect of any wares or services, unless shown to be invalid, gives to the owner the exclusive right to the use throughout Canada of such trade mark in respect of such wares or services.

Section 20 is a deeming provision which defines infringement as follows:

The right of the owner of a registered trade mark to its exclusive use shall be deemed to be infringed by a person not entitled to its use under this Act who sells, distributes or advertises wares or services in association with a confusing trade mark or trade name, but no registration of a trade mark prevents a person from making

- (a) any bona fide use of his personal name as a trade name, or
- (b) any bona fide use, other than as a trade mark,
 - (i) of the geographical name of his place of business, or
 - (ii) of any accurate description of the character or quality of his wares or services,

in such a manner as is not likely to have the effect of depreciating the value of the goodwill attaching to the trade mark.

"Confusing" is defined by s. 6 of the Act:

(1) For the purposes of this Act a trade mark or trade name is confusing with another trade mark or trade name if the use of such first mentioned trade mark or trade name would cause confusion with such last mentioned trade mark or trade name in the manner and circumstances described in this section.

(2) The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares or services associated with such trade marks are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

(3) The use of a trade mark causes confusion with a trade name if the use of both the trade mark and trade name in the same area would be likely to lead to the inference that the wares or services associated with the trade mark and those associated with the business carried on under such trade names are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

(4) The use of a trade name causes confusion with a trade mark if the use of both the trade name and the trade mark in the same area would be likely to lead to the inference that the wares or services associated with the business carried on under such trade name and those associated with such trade mark are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

Subsection (5) of s. 6 provides illustrations of the factors which must be considered in answering the question of whether two marks are in fact confusing:

In determining whether trade marks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including,

(a) the inherent distinctiveness of the trade marks or trade names and the extent to which they have become known;

(b) the length of time the trade marks or trade names have been in use;

(c) the nature of the wares, services or business;

(d) the nature of the trade; and

(e) the degree of resemblance between the trade marks or trade names in appearance or sound or in the ideas suggested by them.

Although it would appear that s. 19 is merely declaratory of the registrant's right, it is possible to bring an action under either section. In Bonus Foods v. Essex Packers¹⁰ it was held that where (1) the defendants' mark and the goods/services involved are the same as the registrant's, we should rely on s. 19, and where (2) the allegedly offending mark is merely similar and the goods/services in association with which it is used are not of the same type as those provided by the registrant, the plaintiff should rely on ss. 20 and 6 to deem an infringement.¹¹ Under s. 20, therefore, it is not essential that the plaintiff and defendant be in competition. This latter feature makes the scope of the infringement action much wider than the action for passing off at common law, where the goods/services in question must generally fall within the same class, at least in a broad sense.¹²

One restriction on the apparently wide scope of ss. 19 and 20 must, however, be mentioned. It seems that an infringing "use" within the meaning of ss. 19 or 20 must involve the use of the offending sign as a trade mark. That is, the exclusive right of the registrant entails the right to use the mark "for the purpose of distinguishing or so as to distinguish" in association with the sale, rental, etc. of wares or services. Other forms of usage thus might not be covered by ss. 19 and 20.¹³

Section 22 (1) of the Act provides a further cause of action:

No person shall use a trade mark registered by another person in a manner likely to have the effect of depreciating the value of the goodwill attaching thereto.

The effect of s. 22(1) was stated by Thurlow, J. in Clairol International v. Thomas Supply and Equipment:

The defendant may of course, put information on his wares for the purpose of telling customers about his own wares in order to get the customers to buy them in preference to those of the owner of a particular trade mark. In general how he may do that is left to his own ingenuity and, provided the means adopted are honest means, no one can challenge him. In short, he may not use his competitor's trade mark for the purpose of appealing to his competitor's customers in his effort to weaken their habit of buying what they have bought before or the likelihood that they would buy competitor's goods so as to secure the customer himself, for this is not only calculated to depreciate and destroy his competitor's goodwill, but is using his competitor's trade mark to accomplish his purpose.¹⁴

This statement would seem to give s. 22(1) a quite wide scope (for instance, in comparative advertising), although it apparently applies only where the actual mark is used. No intention to discredit or dilute the plaintiff's goodwill in the mark is required; nor is proof of actual depreciation essential. It is a point of contention whether the restricted meaning of "use" applied to ss. 19 and 20 should also have effect under s. 22(1).¹⁵ It is suggested that the better view is that it should not, lest s. 22(1) have a meaning different from that of ss. 7 or 20.¹⁶ This may be supported by considering that s. 22(1) speaks of "use ... in a manner likely to" have deprecatory effect.

By s. 55 the Federal Court has jurisdiction (concurrent with the courts of the provinces to entertain any action involving the Act. The remedies available from violation of ss. 19, 20 and 22(1) are dealt with in s. 53:

Where it is made to appear to a court of competent jurisdiction that any act has been done contrary to this Act, the court may make any such order as the circumstances require including provision for relief by way of injunction and the recovery of damages or profits, and may give directions with respect to the disposition of any offending wares, packages, labels and advertising material and of any dies used in connection therewith.

Section 22(2) also provides in respect of an action founded upon s. 22(1) that,

. . . the court may decline to order the recovery of damages or profits and may permit the defendant to continue to sell wares marked with such trade mark that were in his possession or under his control at the time notice was given to him that the owner of the registered trade mark complained of such use.

The general principles applicable to the decision of whether to seek (and grant) an accounting of profits and/or injunctive relief will be the same as those used by the courts in actions for passing off.

Finally, it should be recalled that the owner of a registered trade mark is not prevented from seeking a remedy at common law or under the general unfair competition provisions of s. 7 of the Trade Marks Act. The infringement remedies provided by ss. 19, 20 and 22 are likely, however, to prove more convenient.

(2) At this moment there is one group within the P.O.C.'s professional population that allows its members to carry a

Ontario Association of Engineering Technicians and Technologists (OACETT) carry the designating initials "C.E.T." ("Certified Engineering Technologist"). This is a certification mark owned by the Association of Professional Engineers of Ontario, which grants to OACETT the right to confer the initials upon qualified members of the latter organization.¹⁷

To date, OACETT indicates that, while it has had to caution some persons regarding unauthorized use of the title, no formal infringement actions have been necessary.¹⁸ Apparently, a problem has arisen recently concerning a U.S. organization with Canadian chapters known as the Institute of Certified Electrical Technicians, whose members assume the designatory initials "CET". Communications between OACETT and this association are taking place.¹⁹

It is difficult to speculate on the outcome of an infringement action involving the designation "C.E.T.". Prima facie the mark has been taken by the Registrar as acceptable, and the registration has subsisted without dispute for well over the five year limit for challenges based on prior use by another.²⁰ Were the registration to be successfully challenged on other grounds, it would be a question of fact for the court whether "C.E.T." had acquired a distinctive association with the members of OACETT (secondary meaning). There is some judicial authority for the view that certification marks need not be "distinctive" in quite so high a degree as is required of trade marks.²¹

In addition, the P.O.C. has no knowledge of the existence of a waiver in accordance with s. 34 of the Trade Marks Act.

The absence of such a waiver is not in itself conclusive of the issue whether some part(s) of the "C.E.T." designation may not be used by another body or individual without generating an actionable degree of confusion. It would be reasonable to suggest that use of terms such as (i) "engineering" (ii) "certified" and (iii) "technologists", either alone, in other combinations (of (i) and (iii), or (ii) and (iii)), or in conjunction with some other term(s) will not necessarily constitute an infringement. Considered discretely, each seems to be too common to the language of the trade to be the subject of protection.

Similarly, it can not be predicted with certainty what other combinations of initials would constitute an infringement. At least one British case has suggested that initials alone will rarely be sufficiently distinctive to receive protection.²² Other cases, however, have afforded such relief. In Provident Chemical Works v. Canadian Chemical Manufacturing, the plaintiff, who used the mark "C.A.P." (for "cream acid phosphates") was granted an injunction against the defendant's use of "C.A.P." (for "calcium acid phosphates").²³ In practice, registration has been granted for trade marks consisting of initials in numerous cases.²⁴

FOOTNOTES

1. Fox, The Canadian Law of Trademarks and Unfair Competition (Toronto: 1972) at 1, 18. (Hereafter referred to as "Fox")
2. Ibid., at 18.
3. Ibid., at 25, 29.
4. Ibid., at 22.
5. Trade Marks Act, R.S.C. 1970, c., T-10, ss. 2, 15(3), 37, 39
6. Fox, at 90 ff.
7. Ibid., at 93 ff.
8. Ibid., at 125 ff.
9. Fox, at 27 ff.
10. Bonus Foods v. Essex Packers (1964), 29 Fox Pat. C. 1.
11. Ibid.
12. See p. 28 ff , supra.
13. Fox, at 328 ff.
14. Clairol International v. Thomas Supply and Equipment, [1968] 2 Ex. C.R. SS2, 38 Fox Pat. C. 1176.
15. Bain, "The Law Affecting Comparative Advertising," 32 U. of T. Faculty of Law Review (1974) 109 at 114-115.
16. Ibid.
17. Information supplied to the P.O.C. by Mr. Peter Newmann, OACETT.
18. Ibid.
19. Ibid.
20. See p. 52 , supra.
21. Fox, at 206 ff.

22. Du Cros Ltd. Application (1912), 29 R.P.C. 74, aff'd.
[1913] A.C. 624, 30 R.P.C. 600.
23. Provident Chemical Works v. Canadian Chemical Manufacturing
(1902), 4 O.L.R. 545
24. Fox, at 78 ff.

II.D Copyright

Copyright has been generally defined as,

. . . the right to multiply copies of a published work, or the right to make the work public and still retain the beneficial interest therein.¹

At first glance, it would appear that copyright law is of no avail as a means of protecting the right of persons to use a professional designation. Since, however, at least one voluntary designating association² has apparently purported to register a series of designatory initials under The Copyright Act, R.S.C. 1970, c. C-30, the following is a brief examination of the relevant law. Copyright is an extensive and oftentimes complex field of jurisprudence. The passages that follow are, therefore, no more than a description of its rudimentary elements. Since it is particularly germane, the position of "titles" as subjects of copyright is examined.

(1) Copyright is, in effect, a form of "negative" property, in the sense that it consists of the power to prevent or remedy invasion of an owner's exclusive right to make copies of a work public.³ It is an incorporeal right, subsisting in both published and unpublished works, which automatically accompanies authorship. Subject to certain exceptions, it endures for a period of fifty years after the author's life time.⁴ It has been held that an "author" in copyright law must be a natural person.⁵ Copyright may

be owned by any person or body to whom it has been validly assigned, either explicitly or implicitly. Prima facie, first ownership arises in the author(s).⁶

Although copyright was initially a creation of the common law, it is currently encompassed by The Copyright Act. The two most important features of the Act are, first, the definition of what materials may be subject to copyright, and second, the provision of a remedy for infringement of copyright.

Section 45 provides that no copyright shall exist except under the Act. Section 3(1) of the Act defines "copyright." It states (in part):

For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof . . .

Section 4(1) indicates the general nature of the works in which copyright may subsist:

Subject to this Act, copyright shall subsist in Canada for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work, if the author was at the date of the making of the work a British subject, a citizen or subject of a foreign country that has adhered to the Convention and the Additional Protocol thereto set out in Schedule II, or resident within Her Majesty's Realms and Territories . . .

Section 4(1) is supplemented by further definitions.

The phrase "every original literary, dramatic, musical and artistic work" is defined in s.2(1) to include,

. . . every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets, and other writings, lectures, dramatic or dramatico-musical works, musical works or compositions with or without words, illustrations, sketches, and plastic works relative to geography, topography, architecture or science.

"Work" is stated to include,

. . . the title thereof when such title is original and distinctive (s.2(u)).

These definitions are merely illustrative. "Literary work" will extend to include any work "expressed in print or writing irrespective of whether [its] quality or style is high."⁷

The fundamental requirement of originality has been subject to a wide variety of judicial formulations. In essence it means that the work must not be merely a copy of something in the public domain, or have been copied from another work.⁸ The work must be a product of some application of the author's original thought and skill when regarded as a whole. (The amount of originality that is required will vary with the work in question, and is not a question of any "artistic" or "literary" scale of merit.⁹) The chance production of an identical work by an independent process is not an infringement of copyright.

There are four major points to note regarding copyright as it is defined in the Act. One is that ownership of copyright

is completely distinct from ownership in the tangible embodiment of the work. Possession of the former does not necessarily entail possession of the latter, and transfer of the physical property (e.g. a manuscript) does not effect a transfer of the copyright which subsists in its contents, unless this is otherwise provided for.¹⁰

Secondly, it is important to remember that copyright does not exist in ideas, methods, and so forth. "The Copyright Act does not purport to give a monopoly in ideas, but only in the particular form or media for reproducing or communicating ideas, or, in other words, in the expression of thought and, in the case of literary work, the expression of thought in printing or writing."¹¹

Nor is there copyright in mere words alone. No author/owner can monopolize the use of particular words.¹² The novelist's copyright resides in the sequence of words which form the novel's expression of thought.

Lastly, it is especially relevant to note that, generally at least, there is no copyright in mere titles. This will be discussed further in connection with the remedy for infringement, in Part (3), infra.

As mentioned above, copyright is automatic. It subsists on the instant the original work comes into being and does not require registration or any other formal procedure. Notwithstanding this,

the Act does provide for a system of voluntary registration (s.37). Upon completion of an application and payment of a small fee (currently \$10) the owner, author or another interested person may receive a certificate of registration from the Copyright Office of the Ministry of Consumer and Corporate Affairs indicating the purported title of the work, its nature, its author and the owner.

An application does not require submission or scrutiny of the underlying work, and the Registrar "does not take responsibility for any allegations in a document which you give him."¹³

Registration itself creates no additional right. The value of the certificate is evidentiary only, providing prima facie proof of the existence of a copyright and its ownership. Registration does not guarantee the validity of the copyright, which can be challenged by other evidence.¹⁴ The correctness of a certificate can also be challenged under s. 40, which gives the Federal Court exclusive jurisdiction to order rectification of the register on application by a "person aggrieved."¹⁵

(2) Section 17(1) states that (subject to a list of particular exceptions) copyright shall be deemed to be infringed by anyone who, without the owner's consent, does anything that (under the Act) only the owner may do or permit to be done (see ss. 17 through 19).

To constitute infringement there must be an "identity or similarity of language, phraseology or literary style or form" in some reproduction in material form.¹⁶ In other words, the two essential ingredients are objective similarity and a causal relationship between the copyright work and the subsequent work (i.e., it is not infringement to copy from the same original source as the plaintiff did, but to copy from the plaintiff's work). Neither intention to infringe a copyright nor knowledge that one is infringing are necessary.¹⁷

Section 20(3) creates a statutory presumption in favour of the plaintiff:

In any action for infringement of copyright in any work, in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case,

- (a) the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and
- (b) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright . . .

Section 22 illustrates the usefulness of voluntary registration. It provides:

Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff is not entitled to any remedy other than an injunction in respect of the infringement if the defendant proves that at the date of the infringement he was not aware, and had no reasonable ground for suspecting that copyright subsisted in the work; but if at the date of the infringement

the copyright in the work was duly registered under this Act, the defendant shall be deemed to have had reasonable ground for suspecting that copyright subsisted in the work.

The civil remedies available under s.20 are fourfold: damages commensurate with the harm suffered because of the infringement, an accounting of profits from the defendant (which may be given in addition to general damages), forfeiture of any infringing copies, and injunctive relief. Section 22 (supra.) indicates that where the infringement involves an unregistered copyright of which the defendant was unaware, only an injunction may issue. (The Copyright Act also supplies a summary remedy of fine and/or imprisonment for performance infringements of the rights in dramatic, operatic and musical works.)

(3) It is clear that the title of a work is part of the work so long as it is "original and distinctive." The question of whether unauthorized use of a title alone will constitute infringement is a more vexed issue.

While it is true that there is nothing to exclude titles from protection per se, it will generally be the case that a title will not be a proper subject of an infringement action standing on its own. As it was expressed in Francis, Day & Hunter v. Twentieth Century Fox:¹⁸

In general a title is not by itself a proper subject matter of copyright. As a rule, a title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale, and of so important a character, as to be a proper subject of protection . . .

The originality and distinctiveness of a title are necessary but not sufficient. McIndoo v. Musson Book Co. held that the subject of copyright is the work to which the title is attached.¹⁹ It should be noted that s.2(u) speaks of "the title thereof," thus implicitly assuming some accompanying composition. Moreover, s.3(1) defines copyright as the right to multiply copies of the work "or any substantial part thereof" [emphasis added]. It has been suggested that at most there could be copyright in "a whole page of title, or something of that kind requiring invention."²⁰

Of course, there are other possible sources of protection in the law of passing off, false advertising and trade marks, but copyright will only rarely apply.

(4) What, then, of the use of copyright in connection with professional designations? The Canadian Council of Professional Certification (CCPC)²¹ is an unincorporated association which purports to register, and provide occupational designations for,

persons working in the general field of "manufacturing engineering." The Canadian association is apparently a branch or affiliate of a federally chartered U.S. organization. According to the CCPC's statistics, there are twelve chapters in Ontario and Quebec, with a membership of 2,000 to 3,000. Chapters have been in existence in Ontario for forty years.

Applicants for registration who meet the CCPC's educational and experience requirements and pay a one-time fee of \$50 receive a "certificate." These certificates are said to remain the property of the CCPC and are subject to forfeiture on cessation of membership or as a penalty following disciplinary action.

There are three categories of membership (each presumably with its appropriate certificate). Members use the designation "C.Mfg.E. (Certified in Manufacturing Engineering)," "C.Mfg.T. (Certified Manufacturing Technologist)," or "R.P.E. (Registered in Professional Engineering)." Those in the latter category are required to be legally permitted to practise as professional engineers under the relevant legislation.

There is a certificate of registration on file with the Copyright Office for each of the above categories. These follow a uniform style. To use one example, File No. 172627, Serial No. 266446, Register 141 indicates that an "Unpublished Literary and Artistic" work has been registered, with the title "C.Mfg.E. (Certified in Manufacturing Engineering)." Ownership is indicated as residing

in the CCPC.

Since the copyright registration process neither requires that the Copyright Office receive or examine the underlying work represented by the title, nor indeed indicates whether such a work in fact exists, it cannot be surmised from the certificates of registration whether it is the title itself which is ostensibly registered or whether the title is attached to an underlying work (e.g. one of the CCPC's certificates). It seems clear that it is possible to obtain copyright in the contents of a certificate which uses as its title (for instance) "C.Mfg.E."

A substantial copying of any certificate which qualified as a "work" should constitute an infringement. At the same time, it seems unlikely that the title alone of the certificate would be a valid subject of copyright. Even if the title is "original" and "distinctive" within s.2(u) of the Act, it would not appear to be "on so extensive a scale, and of so important a character" as to be protectable in isolation.²² It is submitted that an unauthorized adoption of the designation "C.Mfg.E." on, e.g., a business card will not be a proper subject of infringement proceedings under The Copyright Act.

Footnotes

1. Underwriters Survey Bureau Ltd. v. Massie & Renwick, [1937] Ex. C.R. 15 at 20, per Maclean J., [1937] S.C.R. 265, [1937] 2 D.L.R. 213.
Also Fox, The Canadian Law of Copyright and Industrial Designs, 2nd ed. (Toronto: 1967) at 1. (Hereafter referred to as "Fox.")
2. See p. 77 ff infra re. the "Canadian Council of Professional Certification."
3. Canadian Admiral Corp. v. Rediffusion Inc., [1954] Ex. C.R. 382, 14 Fox Pat. C. 114, 20 C.P.R. 75. Also Fox at 327.
4. See s. 5.
5. McIndoo v. Musson Book Co. (1915), 35 O.L.R. 42, affirmed 35 O.L.R. 342, 26 D.L.R. 550 (C.A.).
6. See s. 12(1).
7. 5 C.E.D. (Ont. 3rd) at 34-29 ff.
8. Ibid. at 34-27, Kilvington Bros. v. Goldberg (1957), 16 Fox Pat. C. 164 (Ont. Co. Cl.) and Kantel v. Grant, [1933] Ex. C.R. 84.
9. Fox at 41, 107.
10. De Montigny v. Cousineau, [1950] S.C.R. 297, Miller v. Taylor (1769), 4 Burr. 2303 at 2396, per Lord Mansfield: "equally distinct from the manuscript, or any other physical existence whatsoever."
Also Fox at 64, 5 C.E.D. (Ont. 3rd) at 34-11. Assignment and licensing of copyright is controlled by ss. 12-16.
11. 5 C.E.D. (Ont. 3rd) at 34-27, Fox at 45.
12. Fox at 43.
13. Burn, Guide to Patent, Trademark and Copyright Law (Toronto: 1977) at 145.
14. Fox at 317, Circle Film Enterprises v. C.B.C., 19 Fox Pat. C. 39, [1959] S.C.R. 602, 31 C.P.R. 57, 20 D.L.R. (2d) 211.
15. Fox at 318-20.
16. Deeks v. Wells, [1931] O.R. 818, [1931] 4 D.L.R. 533, [1933] 1 D.L.R. 353. Also Fox at 327.
17. Francis, Day & Hunter v. Bron, [1963] 2 All E.R. 16, Fox at 331-32.

18. [1939] 4 All E.R. 192 at 197, per Lord Wright.
Also cited in Fox at 129.
19. Op. cit., n. 5, ante.
20. Dicks v. Yates (1881), 18 Ch. D. 76 at 89, per Jessel, M.R.
Also cited in Francis, Day & Hunter v. Twentieth Century Fox,
supra at 197, and Fox at 129.
21. The following description of the CCPC's organization cannot
be made with certainty. It was compiled from some materials
supplied to the Professional Organizations Committee. A
request from this writer for clarification has, to date, gone
unanswered.
22. Op. cit., p. 77 , supra and n. 19, supra.

II.E Misleading Advertising Legislation

A number of provisions which might be conveniently subsumed under the rubric of false/misleading advertising offences have a possible bearing on the unauthorized use of professional titles. The following briefly describes the relevant offences under (1) the Ontario Business Practices Act, S.O. 1974, c. 131, (2) the Criminal Code, R.S.C. 1970, c. C-34, as amended, (3) the Combines Investigation Act, R.S.C. 1970, c. C-23, as amended, and (4) the Trade Marks Act, R.S.C. 1970, c. T-10.

The law of civil fraud (the torts of deceit or misrepresentation) is not discussed herein. Generally the right to bring suit and recover damages in such cases belongs to the person directly aggrieved (e.g., a party to the transaction). The association whose professional designation has been used to deceive would therefore have no standing in the action. Its remedy for any consequential damage to its interest in the professional designation would seem to lie in such actions as a suit for passing off. (of course, a concerned association which receives a complaint may legitimately inform an aggrieved consumer of the possibility of a civil action.) By contrast, in (1), (2), (3) and (4), following, prosecutions need not be commenced by the consumer who has been directly harmed through the improper practice.

It should be stated at the outset that the following provisions are unlikely to prove widely useful against the unauthorized use of titles. It will be seen that there are problems of application in each case. Still, there may be some instances in which the improper use of a professional title will constitute an offence.

(1) The Ontario Business Practices Act provides that "[n]o person shall engage in an unfair practice" relating to a consumer transaction (s. 3(1)). Section 2 of the Act is a deeming provision, which states (inter alia):

For the purposes of this Act, the following shall be deemed to be unfair practices,

(a) a false, misleading or deceptive consumer representation including, but without restricting the generality of the foregoing,

(i) a representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities they do not have,

(ii) a representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection he does not have.

.

(c) such consumer representations under clause a as are prescribed by the regulations made in accordance with section 16.

Section 2(a) (ii) would seem to be particularly applicable to the unauthorized use of a title in connection with an

offer or supply of services. Two major qualifications, however, apply. First, "consumer" is defined by s. 1(b) as a natural person, not including a natural person, partnership or association of individuals acting in the course of carrying on business. In effect, only household clients requiring services for non-commercial purposes are included. Second, the term "services" is given a very narrow meaning for the purposes of the Act by s. 1(i), so as to encompass only those services,

- (i) provided in respect of goods or of real property, or
- (ii) provided for social, recreational or self-improvement purposes, or
- (iii) that are in their nature instructional or educational.

Presumably some forms of professional service are within the scope of the Business Practices Act. For instance, conveyancing or the preparation of site plans are arguably services undertaken "in respect of . . . real property." Many of the activities of persons working in the fields of law, architecture, accounting and engineering will not, however, be caught by the Act.

In the presence of some "unfair practice" the Act provides three basic remedies: the right of the consumer himself to rescind any agreement or receive compensation, the power of the Director to issue a restraining order, and the provision of a quasi-criminal penalty. The first of these is not of direct interest here, since the remedy must be pursued by the affected consumer. The latter two are briefly outlined in the following paragraphs.

Sections 6(1) and 7(1) of the Act, respectively, provide that:

Where the Director believes on reasonable and probable grounds that any person is engaging or has engaged in an unfair practice, the Director may order such person to comply with section 3 in respect of the unfair practice specified in the order.

.

Notwithstanding section 6, the Director may make an order under subsection 1 of section 6 to take effect immediately where, in his opinion, to do so is necessary for the protection of the public and, subject to subsections 3 and 4, the order takes effect immediately.

Under s. 6 the Director must provide notice of his proposed order, and the alleged offender is entitled to a hearing before the order becomes effective. Under s. 7 the Director may make an immediate restraining order, which can be lifted or continued after the hearing. Recipients of a notice may enter into a voluntary assurance of compliance so as to preclude the making of an order (ss. 6, 7 and 9). Both the Minister of Consumer and Commercial Relations and the Director appointed to administer the Act have the power to order investigations in specified circumstances (ss. 10 and 11).

According to s. 17(1), failure to observe an order or an undertaking to comply, contravention of a regulation and obstruction of an investigation are offences, carrying on summary

conviction "a fine of not more than \$2,000 or . . . imprisonment for a term of not more than one year, or . . . both." A similar penalty is provided in s. 17(2) for the "knowing" performance of any unfair practice other than those which are only proscribed by regulation. In addition, where a corporation is convicted under 17(1) or (2) the maximum penalty is raised to \$25,000 and the possibility of imprisonment is removed.

It seems, therefore, that a professional association which was aware of actions on the part of non-members that violated the Business Practice Act could either seek to have the Director issue a restraining order, or initiate a prosecution under s. 17. For most providers of professional services, however, the Act will have minimal application. Even where the purchasers involved are "consumers" within the meaning of the Act, the services involved will often not meet the restricted definition in s. 1(i).

(2) The Criminal Code contains two offences involving principles similar to the common law of unfair competition and overlapping to some extent with the law of trade marks and unfair advertising.

Section 364 of the Criminal Code states:

For the purposes of this Part, every one forges a trade mark who

(a) without the consent of the proprietor of

the trade mark, makes or reproduces in any manner that trade mark or a mark so nearly resembling it as to be calculated to deceive, or

(b) falsifies, in any manner, a genuine trade mark.

Section 365 then provides as follows:

Every one commits an offence who, with intent to deceive or defraud the public or any person, whether ascertained or not, forges a trade mark.

"Trade mark" is not defined, but s. 3(5) of the Criminal Code generally provides that:

When an offence that is dealt with in this Act relates to a subject that is dealt with in another Act, the words and expressions used in this Act, with respect to that offence have, subject to this Act, the meaning assigned to them in that Act.

The general definition supplied by the Trade Marks Act² should therefore be controlling. This conclusion is supported by the recent decision of the Ontario Court of Appeal in R. v. Strong Cobb Arner of Canada Ltd.³ It was held therein that the Crown is required only to prove that the mark in question falls within the general definition found in s. 2 of the Trade Marks Act. It is suggested also that the phrase "calculated to deceive" in s. 364(a) will receive the same interpretation as in the law of passing off, despite the additional requirement for the criminal offence that the accused acted with an "intent to deceive or defraud." That is, it seems that proof of the criminal intent would not render a mark "calculated to deceive," but rather that this must be a quality of

the mark itself. The question should remain one of fact as to whether the offending mark appeared likely to confuse the potential consumer. On this latter point, however, it should be noted that the hypothetical consumer may not be the "ordinary man" or the typical consumer of the particular goods or services in question. It has been established for prosecutions under the Combines Investigation Act that the hypothetical consumer is the credulous, unthinking, unsophisticated person.⁴ It has been suggested by one commentator that this reflects the public interest bias of the criminal law.⁵ If so, then the Combines standard should arguably be applied equally under the Criminal Code.

Section 366 provides:

Every one commits an offence who, with intent to deceive or defraud the public or any person, whether ascertained or not,

- (a) passes off other wares or services as and for those ordered or required, or
- (b) makes use, in association with wares or services, of any description that is false in a material respect as to
 - (i) the kind, quality, quantity or composition,
 - (ii) the geographical origin, or
 - (iii) the mode of the manufacture, production or performanceof such services.

Section 366(a) covers the direct substitution of another's services without authorization, when accompanied by a criminal intent to defraud. There will undoubtedly be some question as to what are "other services" in this sense. In other words, it may be an open question as to whether the performance of services of an identical nature and quality but under a false claim as to the right of the provider to carry a professional designation will amount to a culpable substitution. Similarly, in the misrepresentation offence under s. 366(b) there is room for some doubt. Would the use of an improperly adopted title in association with the performance of otherwise identical services amount to a false "description" of the "kind" or "quality" of the services "in a material respect"? It should also be noted that there is no provision in s. 366 for descriptions which are "misleading" or "calculated to deceive." It cannot be predicted with certainty whether "false" will be interpreted so as to encompass such usages. The general presumption in the criminal law is that offences will be construed strictly.

It is submitted that there is some precedent for the argument that a false representation of status, affiliation, etc., when coupled with the criminal intent to deceive, should be within the scope of s. 366. In R. v. Maurantonio, [1968] 2 C.C.C. 115, 2. C.R.N.S. 375 (Ont. C.A.). the accused had performed physical examinations on a number of women, falsely representing himself as a doctor. Charged with indecent assault, the accused raised

the defence of consent. Section 148(2) provides that the consent of the victim is no defence where it was obtained by "false and fraudulent representations as to the nature and quality of the act." It was held that the "nature and quality" included the circumstances of the examinations, so that whether or not the examinations were performed in the same manner as those done by an actual doctor the victims were subjected to a procedure which in its "nature and quality" was not that to which they had consented. By analogy, it may be that the provision of services in association with a falsely assumed title will constitute an offence in some circumstances. For instance a consumer may engage the services of a particular person on the expectation that the provider is a member of an association which offers such things as a client indemnity fund. The absence of such features may be taken as going to the "kind" or "quality" of the services in a "material respect."

The penalty for both of the above offences is provided in s. 370(1), which enacts:

Every one who commits an offence under section 365, 366 . . . is guilty of

(a) an indictable offence and is liable to imprisonment for two years, or

(b) an offence punishable on summary conviction.

(It should be mentioned that the decision to proceed by indictment or summarily is in the discretion of the Crown. Private prosecutions

may only be conducted summarily. The Crown is required to take over the conduct of an indictable offence prosecution. The Crown may also step in to a summary prosecution and reconstitute it as a proceeding by indictment.⁶) The general maximum penalty for conviction on a summary offence is \$500 or six months imprisonment, or both (s. 722(1)). Section 646(1) provides that:

An accused who is convicted of an indictable offence punishable with imprisonment for five years or less may be fined in addition to or in lieu of any other punishment that is authorized, but an accused shall not be fined in lieu of imprisonment where the offence of which he is convicted is punishable by a minimum term of imprisonment.

In addition, s. 647 deals with the conviction of corporations as opposed to natural persons, and states:

. . . a corporation that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence,

(a) to be fined in an amount that is in the discretion of the court, where the offence is an indictable offence, or

(b) to be fined in an amount not exceeding one thousand dollars where the offence is a summary conviction offence.

An additional remedy for the breach of ss. 365 or 366 is provided in s. 370(2):

Any thing by means of or in relation to which a person commits an offence under section 365, 366 . . . is, unless the court otherwise orders, forfeited upon conviction of the person for that offence.

This section would entail, for example, the forfeiture of improperly marked goods, and could conceivably apply to the forfeiture of business cards, letterheads, etc. which contained an offending misrepresentation.

Finally, it should be mentioned that s. 653[1] provides:

A court that convicts an accused of an indictable offence may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by the applicant as a result of the commission of the offence of which the accused is convicted.

The constitutional validity of s. 653 was recently challenged and upheld.⁷ "Property" is illustratively, but, it is submitted, not exhaustively, defined in s. 2. "Person" is defined in s. 2 to include "bodies corporate, societies, companies . . ." Could this section be invoked to compensate the owner of a trade mark which was forged or a person who was damaged by the commission of an offence in relation to a trade name, title, packaging "get up," etc. in which he had a commercial interest? Trade marks are consistently regarded by the courts as a form of incorporeal property.⁸ The status of other trade names, "get ups" and so forth which may be protected against off is much less certain. There are cases for and against the conclusion that a form of property is involved.⁹ In any case, a more fundamental problem would emerge in any attempt to invoke s. 653: the loss or damage suffered through the misuse of a trade mark, trade name, etc.

would seem to go to commercial expectation (e.g., a loss of potential sales) rather than the mark or title itself. This may therefore not be perceived as a loss or damage to "property" within the intention of s. 653 --a section which, it seems, is primarily designed to provide for compensation in cases of theft and so forth.

(3) The Combines Investigation Act is of interest for its inclusion of a misleading advertising offence which may have some application to the improper appropriation of professional designations. Section 36 of the Act states (in part):

(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly, or indirectly, any business interest, by any means whatever.

(a) Make a representation to the public that is false or misleading in a material respect
.

(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

(5) Any person who violates subsection (1) is guilty of an offence and is liable

(a) on conviction on indictment, to a fine in the discretion of the court or imprisonment for five years or to both; or

(b) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

Subsections (2) and (3) contain specific instances of practices which shall be deemed to constitute representations to the public (these would not seem to be exhaustive of the possible modes of representation). According to s. 3 "product" includes a service, and "service" includes a service of any description, while "supply" means the sale, rental or other provision of a service or an offer to so provide it.

Section 37.3 contains a number of statutory defences to a prosecution under s. 36. It states:

(1) Sections 36 to 37.2 do not apply to a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person in Canada, where he establishes that he obtained and recorded the name and address of that other person and that he accepted the representation or advertisement on good faith for printing, publishing or other distribution in the ordinary course of his business.

(2) No person shall be convicted of an offence under section 36 or 36.1, if he establishes that,

(a) the act or omission giving rise to the offence with which he is charged was the result of error:

(b) he took reasonable precautions and exercised due diligence to prevent the occurrence of such error;

(c) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and

(d) the measures referred to in paragraph (c), except where the representation related to a security, were taken forthwith after the representation was made or the testimonial was published.

(3) Subsection (2) does not apply in respect of a person who, in Canada, on behalf of a person outside Canada, makes a representation to the public or publishes a testimonial.

It seems that the central question in a prosecution under s. 36 of the Combines Investigation Act will be whether or not the representation made was, in the light of s. 36(4), "false or misleading in a material respect." It has been previously noted that in considering whether a representation is "false or misleading" within the meaning of s. 36, the hypothetical addressee will be the unthinking, credulous person, as opposed to the "ordinary man."¹⁰

(4) The Trade Marks Act, s. 7(d) prohibits the use,

. . . in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to

(i) the character, quality, quantity or composition,

(ii) the geographical origin, or

(iii) the mode or the manufacture, production or performance

Of such wares or services . . .

The wording of s. 7(d) is very similar to that found in s. 366(b)

(i)-(iii) (supra.). The Trade Marks Act provision adds the requirement that the "description" be both "false" and "likely to mislead", while containing no requirement of an "intent to deceive or defraud".

The difficulties of interpretation presented have already been discussed. In Clairol International v. Thomas Supply and Equipment Co., Thurlow, J. considered the hypothetical consumer under s. 7(d) to be the person of "ordinary intelligence", rather than the credulous, unthinking person standard resorted to under s. 36 of the Combines legislation. One commentator has suggested that "despite being prohibitive in language, the Trade Marks Act is not a criminal law statute and the ordinary man standard is probably more appropriate." 11

FOOTNOTES

1. Criminal Code, R.S.C. 1970, c. C-3, as amended.
2. Trade Marks Act, R.S.C. 1970, c. T-10. See pp. 46 ff, supra.
3. R. v. Strong Cobb Arner of Canada Ltd. (1973), 15 C.C.C. (2d) 288, aff'd. 16 C.C.C. (2d) 150 (Ont. C.A.)
4. Bain, "The Law Affecting Corporative Advertising," 32 U. of T. Faculty of Law Review (1974) 109 at 110.
5. Ibid.
6. See Salhany, Canadian Criminal Procedure (Toronto: 1978) at 177 ff.
7. Re Torek (1974), 15 C.C.C. (2d) 296, 2 O.R. (2d) 288 (H.C.)
8. See Fox, The Canadian Law of Trade Marks and Unfair Competition (Toronto, 1972) .
9. Ibid.
10. Bain, op. cit., n.4, supra.
11. Clairol International v. Thomas Supply and Equipment, [1968] 2 Ex. C.R. 552, 38 Fox Pat. C. 176.
Bain, op. cit., n. 4, supra.

II.F Corporate Status

The vast majority of the designating associations identified in Appendix 01 to this paper have (in the absence of statutory authority) been privately incorporated.

The following passages are not concerned with the financial advantages of incorporation, nor with the detailed requirements of an application for corporate status. The precise organizational requirements of the corporations Act regarding such things as officers, books, elections, by-laws and so forth are also beyond the scope of this paper. A detailed guide to the above can be readily found in the Ontario Corporations Manual and Canada Corporations Manual.¹

In Part (1) section (a) contains a brief general description of the process of incorporation and (b) is a short summary of the provisions of the corporations Acts and regulations concerning the approval and protection of corporate names. The effect of corporate status on the protection of professional designations is noted. Part (2) discusses some of the possible advantages of corporate status in pursuing a remedy against the unauthorized use of a designation.

(1) The reforms of the last decade in company law have had little effect on the category of without-share-capital (Ontario)

or not-for-profit (Dominion) corporations. Such bodies are, for the most part, still governed by the older Ontario Corporations Act, R.S.O. 1970, c. 89 and Canada Corporations Act, R.S.C. 1970, c. C-32. Business corporations have been largely removed from these statutes, and are now governed primarily by the newer Ontario Business Corporations Act, R.S.O. 1970, c. 53, as amended and Canada Business Corporations Act S.C. 1974-75-76, c. C-33.

(a) In this section, the Ontario statute is used for illustration, the Canadian law being mentioned only where there is some substantial difference.

Non-profit corporations in Ontario are governed by Part III of The Corporations Act. Section 119 states that a corporation may be formed for,

. . . objects that are of a patriotic, religious, philanthropic, charitable, educational, agricultural, scientific, artistic, social, professional, fraternal, sporting or athletic nature or that are of any other useful nature.

Section 154(1) of the Canada Corporations Act has a substantially similar content, with the additional proviso that the objects to be pursued must fall within the legislative competence of the Dominion.² It is possible for a non-profit corporation to carry on businesses that are reasonably incidental to its objects - for example, to print and distribute for sale a professional journal. Section 127 of the Ontario Act contains the

essential requirement that these corporations not be carried on for the purpose of pecuniary gain to their members, and that all profits shall be used for promoting the stated objects of the corporation.³ Since we are concerned here with professional designating associations it should be emphasized that individual members may join the corporation for the purpose of procuring some pecuniary advantage through the use of a title conferred by the corporation as an incident of membership. Section 127 merely means that the corporation itself --as a legal entity distinct from its members-- may not distribute any profits or assets it acquires to the membership.

While incorporation for business purposes is now as of right upon compliance with the required formalities, and the Registrar of companies basically has no discretion to refuse to accept a complete application, non-profit incorporation remains a "privilege." The granting of letters patent is an executive function of the Crown, acting through the minister responsible for corporations. As was said in the leading use of Bonanza Creek Gold Mining Co. Ltd. v. The King⁴ concerning the grant of letters patent by the Dominion, the Sovereign acts through his delegate and it is ". . . by the exercise of the executive power of the Sovereign that the company is brought into existence."⁵ Section 4 of the Ontario Act provides this general power to issue letters patent.⁶ Supplementary letters patent may be subsequently issued to alter such things as the objects or name of a corporation.⁷

The executive act falls within the area of ministerial discretion, and is therefore unlikely to be subject to review by the courts.⁸ In reaching his decision, the minister is entitled to take into consideration all proper issues of public policy. Incorporation may therefore be withheld where in the minister's opinion it is undesirable on public grounds, even though the applicants have complied fully with the requirements of the Acts.⁹ In the exercise of his discretion the minister (i.e. his department) must review all applications for incorporation, and he is entitled to consult those persons and consider those factors he sees fit, subject only, perhaps, to the fundamental requirement that his considerations be relevant and not arbitrary.¹⁰

It appears to be common practice in the ministry to forward the proposed letters patent of professional bodies to affected parties (such as other organizations in the same field) for comment and suggestion.¹¹ Thus, an informal "objection" and "hearing" mechanism is possible. In addition, the ministry may formulate certain "rules of thumb" regarding the incorporation of such bodies - as will be seen in the discussion relating to corporate names. Rather than refuse to grant letters patent outright, the minister may allow incorporation on the basis of specifically limited objects.¹²

Since the powers of the minister are so wide and the possible facets of "the public interest" are so numerous, it is not possible to summarize the variations in objects (and resulting

powers) which may occur among the many privately incorporated professional organizations. The reader is referred to the Appendices of the Professional Organizations Committee's Profiles and the Profiles themselves, which reproduce the objects of the major privately incorporated bodies in its professional population.¹³

It should be said that the discretion of the minister to refuse incorporation is exercised "sparingly."¹⁴ It would probably not be far wrong to theorize that since freedom of association and action are fundamental principles there is no general reason to prohibit groups from enjoying the advantages of incorporation, at least so long as their objects are legitimate and the proposed corporations will not have a demonstrably negative potential effect nor be unable to properly carry out their stated aims.

(b) (i) Corporate Names

Both the Canadian and Ontario corporations Acts contain stringent requirements for the recognition of corporate names. These are primarily designed to ensure that names do not breed confusion in the minds of those persons who deal with them as to the identity of the corporations. The Dominion provisions are more detailed, and will be used for illustration.

Section 25 positively requires that "limited" or "ltd."

form the last part of every corporate name.¹⁵ The words "corporation," "inc.," etc. are not mandatory. Section 28(1) states:

A company shall not be incorporated

- (a) with a name that is the same or similar to the name under which any other company, society, association or firm, in existence, is carrying on business in Canada or is incorporated under the laws of Canada or any province thereof, or that so nearly resembles that name as to be calculated to deceive, except where the existing company, society, association or firm is in the course of being dissolved or of changing its name and signifies its consent in such manner as the Minister requires, or
- (b) with a name that is otherwise on public grounds objectionable.

As in the law of passing off, the term "calculated to deceive" denotes the objective quality that the name is "likely to deceive."¹⁶ The scope of s. 28(1)(a), as can be seen, is fairly wide, since it refers to similarity with the names of societies, associations, or firms as well as with the names of corporations. One difficulty may arise, however, from the inclusion of the phrase "carrying on business." Would s. 28(1)(a) be read to prohibit a corporate name similar to that of an unincorporated professional association, which may not be seen as "carrying on business?" It is suggested that this phrase should be read in its widest sense so as to include such cases. In any event, the minister's discretionary power would allow him to consider such sources of confusion.¹⁷

Section 28(1) is supplemented by a complex set of

regulations,¹⁸ which provide (in part) that a name shall be considered "objectionable" when it is "prohibited" or "deceptively misdescriptive" (s. 11). There are specific prohibitions relating to names which are confusing with a trade mark or trade name (s. 13), suggestive of some official sanction or affiliation (s. 17), obscene (s. 18), or lacking in distinctiveness (s. 19). Section 23 of the regulations defines the term "deceptively misdescriptive" to mean that the name deceptively misdescribes the business, goods or services in association with which it is used, the conditions under which they will be supplied or performed or their place of origin.

The Act and regulations are further supplemented by the policy of the minister. The Federal department has published a policy statement on certain considerations relating to corporate names.¹⁹ This statement does not, of course, exhaust the discretion of the minister to refuse the use of a name on any public grounds. Some particularly relevant parts of the policy statement are mentioned below.

At the present time, the Ministry maintains an index of the names of all bodies incorporated in Canada, registered trade marks, and the trade names of unincorporated bodies which have submitted notice of their names to the department.²⁰ When the formation of a corporation or change of an existing name by supplementary letters patent is proposed, the

department conducts a search of its name registers. The clearance of a name, however, is not a guarantee, and the corporation must assume responsibility if a name is subsequently proven to be confusing.²¹ Moreover, the issuance of letters patent in a given name does not protect the corporation from attack under the law of passing off or registered trade mark infringement.

The Act also provides for a compulsory change of name in s. 28(2). When a name has "through inadvertence or otherwise" been granted which violates s. 28(1) or the regulations under s. 28(1)(b), the minister may serve notice on the corporation and direct the issue of supplementary letters patent changing the name.

A compulsory change of name (or a refusal to change a name) is reviewable on appeal. The usual (informal) procedure will be for the ministry to accept objections to any name, hear representations from all parties, and then render its decision. Any party who is dissatisfied with the final decision of the minister may then seek judicial review.²² However, it is not necessary for an objector to go through the department's procedure before seeking review of the grant of a name.²³

For Ontario non-profit corporations the provincial Act provides in s. 13(1):

A corporation shall not be given a name,

- (a) that is the same as or similar to the name of a known corporation, association, partnership, individual or business if its

use would be likely to deceive, except where the corporation, association, partnership, individual or person signifies its or his consent in writing that its or his name in whole or in part be granted, and, if required by the Minister

- (i) in the case of a corporation, undertakes to dissolve or change its name within six months after the incorporation of the new corporation, or
- (ii) in the case of an association, partnership or individual, undertakes to cease to carry on its or his business or activities, or change its or his name, within six months after the incorporation of the new corporation;
- (b) that suggests or implies a connection with the Crown or any member of the Royal Family or the Government of Canada or the government of any province of Canada or any department, branch, bureau, service, agency, or activity of any such government without the consent in writing of the appropriate authority;
- (c) that, when the objects applied for are of a political nature, suggests or implies a connection with a political party or a leader of a political party;
- (d) that includes the word "co-operative" or any abbreviation or derivation thereof unless the corporation is subject to Part V; or
- (e) that is objectionable on any public grounds.

(The term "limited" is not included, but the words "corp." or "inc." may be. "Company" is defined to mean a share capital corporation, and so may not be used.) Note that s. 13(1)(a) does not require that the existing entity be carrying on business in Canada or even carrying on business. The pool of names which must be considered is therefore potentially very wide.

There are existing regulations to supplement the Act in

this area, but they are not extensive. The ban on names which are "objectionable" in s. 13(1)(e) is, however, essentially similar to that s. 28(1)(b) of the Dominion Act, and it is probable that departmental policy regarding corporate names will follow the same considerations as are applied in the Federal jurisdiction. Since the minister retains a general discretion to refuse a name on considerations of public interest, the specification of circumstances under which a name will be refused in a regulation is not strictly necessary.

As is the case with the Federal department, the ministry maintains a register of the names of all bodies incorporated or licensed to hold land and carry on business in the province. This is supplemented by notifications from others of their trade names. The procedure relating to name searches, and their legal effect, is substantially similar in both cases. The provisions for voluntary and compulsory change of name are also fundamentally the same.

(b)(ii) Trade Names

At common law both corporations and unincorporated entities are free (subject to the possibility of trade marks infringement or civil liability) to carry on their affairs under any name they choose.

In the Dominion jurisdiction any entity can inform the minister of its chosen trade name(s).²⁴ These names will thereafter be included in corporate name searches, and will be considered in the decision to approve a corporate name.

In Ontario, unincorporated entities may receive the same treatment. Corporations, however, are prohibited by The Corporations Information Act, S.O. 1971, c. 27, s. 2(1) from using a name or style different from their corporate name unless such trade name is registered with the minister. Registration is for renewable five year periods.

In no case does notification of the minister or registration confer on the entity any right in a name which it does not otherwise have. As with corporate names, the provisions allow persons to ensure that their name will not be duplicated or approximated by a corporation in a manner which could serve to confuse the public. It should be mentioned as well that this protection is "one way": unincorporated bodies may have their trade names protected vis-à-vis corporations, but neither corporations nor unincorporated entities are given any assurance under the corporations Acts against a confusing adoption of their name by another unincorporated body.

A number of factors are likely to be particularly relevant to a professional association which seeks approval of its name for the purposes of incorporation. In the following,

the Acts, regulations and policies of the Ontario and Canadian jurisdictions are treated interchangeably. As has been mentioned, it is assumed that similar considerations will be applied by each ministry.

Section 17(c) of the regulations under the Dominion statute provides that a corporate name is prohibited where it connotes that the proposed corporation,

is sponsored or controlled by or is affiliated with a university or an association of accountants, architects, engineers, lawyers, physicians, surgeons or any other professional association recognized by the laws of Canada or a province unless the appropriate university or professional association consents in writing to the use of the name . . .

Given the fairly large number of professional associations, a new corporation may experience some difficulty. This is especially so where existing corporations or public bodies include as part of their titles words which generally apply to a broad field of activity. It will be a question of fact in each case whether the use of additional words in connection with a general term will be sufficiently non-suggestive of affiliation. (For example, would a private corporation known as the 'Association of Certified Engineers' be adequately distinct from the Association of Professional Engineers of Ontario?)

Section 19 provides that a name is prohibited where it lacks distinctiveness for the reason that (among others),

- (a) it is only descriptive in any language of the quality, function or other

characteristic of the goods or services
in which the corporation deals or intends
to deal.

Two possible questions arise here. First, would the use of an association name such as "Certified Engineering of Ontario" offend as merely describing the "quality" of the services offered by its members? Second, would such considerations be applied at all, given that the association itself does not "deal" in services?

Section 23 prohibits any corporate name which misdescribes,

- (a) the business, goods or services in association
with which it is proposed to be used.

One interesting question: could a title such as "Certified Engineers" be misdescriptive when applied to a corporation whose members are in fact not required to meet any standards of training or skill for admission, contrary to the strong connotations of the word "certified?"

There are indications that the Ministries have directed their attention to the question of professional associations in the area of policy. For instance, the Ontario Ministry has a departmental rule that the use of the word "association" will only be considered if the applicants file an affidavit stating that the membership of the corporation will represent an appreciable proportion of the persons denoted. "For example, the name 'Hamilton Retail Tobacco Distributors Association' would not be granted if only ten per cent of the retail tobacco distributors in Hamilton are expected to become members."²⁵ It is assumed that this factor will be regarded in the use of terms such as "board," "council," and so forth. Similarly, use of the word "engineering" will be

permitted only on confirmation from the Association of Professional Engineers of Ontario that at least one of the first directors of the corporation is a licensed professional engineer.

(2) The advantages of incorporation from the point of view of a professional association's desire to protect its name are obvious. The process of clearing a proposed name tends to ensure that the corporation's name is not one which is the same as, or confusingly similar or suggestive in relation to, that of any existing body whose corporate or trade name is found in the ministry's files. The association is assured that no new corporation is likely to be permitted to adopt a name which is "objectionable" in relation to its own. However, this latter assurance is available to any unincorporated entity as well, and neither form of association is assured by the corporation's statutes in themselves that a name which would "offend" if proposed for a corporation will not be assumed by an unincorporated group.

The corporations Acts do not anticipate the problem of whether or not the professional designations conferred by incorporated associations on their members should be afforded registration and protection in the same way as the association's corporate name. The power to confer titles will be a product of the approved objects of the corporation, so that between corporations confusing overlaps may be prevented through the power of the ministry to limit or refuse their objects. Thus, an association which is

granted letters patent with the power to confer designations should have priority of use of the title over a subsequent applicant. The existence of such a power in the corporation's objects tends to add some quality of legitimacy to the designation, although short of voicing its objection to the incorporation of additional bodies with similar designations, the corporation and its members are left to enforce their interest in a title by other means.

The advantage of corporate status in any attempt to remedy the unauthorized appropriation of such title would seem to lie, rather, in the existence of the corporate entity. This advantage may best be shown negatively, by discussing the disadvantages in this respect which are attendant on non-incorporated status.

Subject to any specific legal prohibition, it is fundamental that groups of persons are free to associate -- and to structure their association -- as they see fit. Members of non-incorporated associations may avail themselves of the form of internal organization that suits their needs and desires. Such associations are generally free to engage in any activities which their members would be free to pursue as individuals.

The major disadvantage of non-incorporated status (leaving aside such things as tax considerations, etc.) lies

in the fact that the association has no legal existence or "personality" apart from its individual members.²⁶

A non-incorporated body cannot enter contracts, hold property, sue or be sued in its own name.²⁷ All assets and liabilities of the group accrue to its individual members. When the "association" acts, through its chief officers, they will generally be taken as the agents or trustees of the members.²⁸ At most, this relationship may presumably be altered somewhat by contract. For instance, one group of individuals may hold all of the association's property in their own names, while stipulating that other entrants will acquire no proprietary interest. This is to say no more than that if ten persons purchase a table they will generally be assumed to have some ownership in common unless it is demonstrated that their intention is otherwise.

Since there is no separate entity, the common interests of the members can usually only be enforced in a civil suit by means of a class action, in which one or more members sue on behalf of themselves and all others who have a common material interest. Such actions are provided for in Canada, but the substantive requirements for class suits have traditionally been very strictly construed by the courts.²⁹

The existence of a separate entity may therefore

prove to be a major convenience. It should be remembered, however, that it will not always be so. Under the terms of the Trade Marks Act (supra.) a certification mark may not be adopted or registered by any person engaged in the commercial provision of the services in relation to which the mark is used. It is submitted that an incorporated professional association may adopt and register a certification mark which is then used under licence by its members. It seems clear that an unincorporated body may not do so, because the association is not an entity apart from the aggregate of its members.³⁰ On the other hand, the existence of a separate entity may be irrelevant to persons attempting to protect their professional title through an action for passing off since their protectable interest in a given circumstance might not accrue to the association, but rather to the member in the course of his trade. However, professional associations have occasionally sued successfully in this area.³¹

FOOTNOTES

1. Both ed. by Kingston,
(Toronto: Butterworth's, n.d.) (Hereafter referred to as
"Can. C.M." and "Ont. C.M.")
2. See ss. 91(1) and (2) and 92(11) of the British North
America Act. The provinces are given the power to
incorporate bodies for provincial objects.
3. See Can. C.M., at 15-14.
4. Bonanza Creek Gold Mining Co. Ltd. v. The King, (1916)
A.C. 566 (P.C.)
5. Ibid., at 582 per Viscount Haldane.
6. See s. 5 of the Dominion Act.
7. Per s. 5. See s. 20 of the Dominion Act.
8. Can. C.M., at 4-54
9. Ibid.
10. Ibid., at 4-54, 4-56
11. See, e.g., material in the Appendicies to the P.O.C.'s
Profile on the practice of accounting. The letters patent
of the Institute of Law Clerks of Ontario were reviewed
jointly by the Ministry, the Law Society and the I.L.C.O.
12. Ont. C.M., at 7503 ff.
13. On file with the P.O.C.
14. Can. C.M., at 4-54.
15. Cf. s. 15 of the provincial act, which merely prohibits
the use of "limited" by non-incorporated persons.
16. See p. 28 ff supra.
17. Ont. C.M., at 1504-1505.
18. Canada Corporation Regulations, Orders-in-Council
P.C. 1975 - 3001, 1976 - 1081, 1976 - 3168, 1977 - 2367,
1977 - 3682 and 1978 - 1263.

19. See Can. C.M., at 3-22, et passim.
20. Ibid., at 3-32 CL.
21. Ibid., at 3-33
22. See s. 239 of the Dominion Act.
23. Can. C.M., at 3-33, 3-34
24. Ibid., at 3-34.
25. Ont. C.M., at 7507 - 7508
26. Ibid., at 7504
27. Ibid., at 7503-7504. See The Interpretation Act, R.S.O. 1970, c. 225, ss. 26, 27 (g).
28. Ibid., at 7503-7505.
29. Watson, Borins and Williams, Canadian Civil Procedure (Toronto: 1973) at 497.
30. See p. 48 supra.
31. See p. 42 supra.

II.G Summary

The preceding portions of this chapter have briefly described a number of legal mechanisms which (at least potentially) may be resorted to by voluntary professional associations or their individual members to gain some protection for their professional/occupational titles. The laws relating to statutory protection of titles, passing off, registered trade marks, copyright and misleading advertising have been outlined. The process of private incorporation as a non-profit organization has also been canvassed.

These legal mechanisms can be evaluated from at least two perspectives. From the point of view of a hypothetical designating association, one can ask which mechanisms are the most efficacious in deterring and/or remedying unauthorized use of their titles by non-members. On the side of the "public interest" one can enquire as to which of these legal mechanisms contain the greatest potential for some public scrutiny, or some attention to the "public interest," in relation to the attempts by voluntary professional organizations to procure a protected right to use a professional title. This latter question assumes that there may perhaps be a need for some form of control to ensure that the "informational" and/or "certifying" content suggested by professional designations have some foundation in fact.

(1) From the perspective of a voluntary designating group and its members it can be assumed that the most advantageous methods for discouraging the unauthorized adoption of their professional titles will be those which are relatively certain, swift and cost-efficient. Obviously, when procedural and substantive difficulties and/or high cost risks are present, the burden of pursuing a remedy is liable to outweigh the perceived benefits of the cure.

It is not possible to construct an absolute scale of efficiency in this sense. Legal costs may be prohibitively high for one group and not for another. The relative advantages of a given remedy are likely to be dependant in part on the facts of the particular case. One group may have the motivation and resources to police its rights vigilantly, while another may not. Still, it will be seen that (subject to their availability to the group in question) two mechanisms offer distinct advantages.

All other things being equal, it seems safe to say that statutory protection of a title will be generally the most certain and efficient. The statutory schemes employed in Ontario are fairly uniform in their basic structure. One provision defines the association's right to confer a particular designation, while a second provision renders it a summary offence for non-members to hold themselves out to the public under that title. The fact that the right to carry a title derives from the will of

the legislature ensures that it is not open to challenge (short of a statutory amendment). Members are not faced with demonstrating some "proprietary" interest upon which to found their right to exclude non-members from adopting the same (or a confusingly similar) title. It is clear that the legislature may reserve for the use of a particular group wide generic or descriptive terms which would be difficult for the association to appropriate in any other way.

The use of summary prosecutions and statutory rights of injunction is also most likely to be (relatively) swift and cost-efficient. The laying of a charge is not hampered by considerations of whether the association can proceed in its own name or a representative suit by one member on behalf of the others is necessary, since a prosecution may be initiated by any person with knowledge, or reasonable and probable grounds to believe, that an offence has taken place. One would imagine that the costs of conducting a prosecution in Provincial Court (Criminal Division) --while they may be significant in some instances-- are likely to average well below the costs of a complex civil action. The prosecutor who loses his case does not usually face the threat of having the acquitted person's costs ordered against him. Moreover, it is possible that a prosecution, once initiated, will be conducted by the Crown. In such cases, only the expense of the initial investigation will be borne by the association or individual. (In addition, it is possible that the interests of the professional group may be served by the actions of individuals who may decide

to initiate, and perhaps conduct, a prosecution themselves. Of course, it is likely that only the associations will have the expertise, as well as the motivation, to avail themselves of the statutory prohibitions.)

One is inclined to feel, also, that the threat of prosecution and the imposition of a fine (or even a term of imprisonment) should be an effective deterrent. Despite the fact that unauthorized use of a title should best be characterized as a regulatory offence, the proceedings are quasi-criminal. Even where the fine provided is minimal, there is something to be said for the fact that acquisition of a quasi-criminal record is an onerous circumstance. Leaving aside the question of principal, it is also possible under some statutes for the professional association to regain some of its costs when the fine is made payable to its treasury rather than to the State.

To counterbalance the foregoing it must be emphasized that statutory protection is the most difficult to obtain for an existing or proposed professional group. In the areas of law, accounting, engineering and architecture, very few professional groups presently enjoy this status. Basically, the only means of acquiring such status is through the making of representations to the government and, perhaps, the solicitation of public support.

Perhaps the next most certain means of assuring a right in a particular designation lies in the use of a registered trade

mark or certification mark under the Trade Marks Act, R.S.C. 1970, c. T-10. Registration establishes a property right in the mark on the part of the owner. Use of the mark can thereafter be granted through licensing or the registration of users. Short of a successful attack on the validity of the mark's registration, the right is generally not open to challenge. Moreover, if the mark has gained distinctiveness in fact --through acceptance by consumers as an indication which distinguishes the mark's users from other providers of services-- the invalidity of the registration at the date it was made becomes largely irrelevant.

The use of certification marks should be the most apt for professional associations. These marks are designed to indicate that the product or services in association with which they are used have meet a defined standard. The owner of the mark is the creator of the standard, who must not himself be involved in the commercial use of the mark (i.e., in the provision of services). This should generate no difficulty for an incorporated body, which is legally distinct from its members. Unincorporated associations of practitioners, however, could not own a certification mark, since the owners themselves would be involved in the provision of services. It would be necessary to locate ownership in some non-member. General registered trade marks do not present this problem, since ownership could be vested either in a body corporate or (in common) in one or more of the members of an unincorporated group.

Assuming for the moment that a designation falls within

both the general definition of a trade mark (which is wider under the Act than at common law) and the requirements for registrability, registration does not seem to be very difficult to obtain, considering its possible benefits. The "infringement" remedies provided by the Trade Marks Act in this area are fairly wide. The effect of the Act is to bar others from using the same or a confusingly similar mark (i.e., one which carries the probability that consumers will mistake one for the other) in the market for services on a national scale. In addition, it is provided that no one may use a registered trade mark so as to depreciate the value of the goodwill generated by the mark for its owner (and users). Moreover, these remedies are available to the owners of registered trade marks or certification marks in addition to any other remedies available at common law or under other provisions of the Trade Marks Act (infra.).

In terms of swiftness and certainty it may be that private actions under the Trade Marks Act in respect of registered marks do not compare too disfavourably to the use of summary prosecutions. The complexity and cost of conducting an action are, however, liable to be much higher. The cost risk is further compounded by the fact that, while the successful plaintiff may be awarded his costs, the unsuccessful plaintiff may be ordered to pay some or all of the defendant's legal expenses. The plaintiff may be just as deterred by this risk from pursuing his remedy

as the potential defendant is discouraged by the threat of an injunction, an award of damages or an accounting of his profits from engaging in an infringement of the plaintiff's right. On the other hand, the monetary significance of a damages award or accounting of profits may be quite large, and the possibility of securing both interim and permanent injunctions against the defendant may be quite useful.

In many cases, however, it is possible that a professional designation will be prima facie unregistrable. This may be less likely to occur in the case of certification marks, since there is some judicial authority that the strictness of the standards which a mark must meet are somewhat more relaxed in this area. In cases where the association's mark does not meet the standards for registrability, or where the sign does not constitute a trade mark at all, the only other direct recourse available lies in the law of passing off, whether at common law or in its (slightly wider in scope) equivalent under the Trade Marks Act. While the standards which must be met for registrability may be much higher than those required to simply gain protection from misappropriation of a mark or distinguishing sign in passing off, the latter action is more difficult in itself to sustain than an infringement suit in relation to a registered mark.

There are three essential elements which must be proven to sustain a suit based on passing off. The plaintiff must show that

he was the first user of the sign in question (mark, name, title, guise, etc.) and that he has consistently and exclusively used it in association with his goods or services so as to distinguish their source or origin (not their character or quality) for the typical consumer. It will generally not be possible to claim the right to use words which are generic, merely descriptive or of common currency in the trade.

Assuming that the plaintiff has generated some form of goodwill, reputation or commercial credibility in the use of his distinguishing sign, he must then show that the defendant has acted in a way which is likely to deceive the typical consumer. Short of the case where the defendant has substituted his own goods for those of the plaintiff or simply copied the plaintiff's sign, the court must be satisfied that the sign used by the defendant is of such similarity that, in all of the circumstances, a consumer is liable to mistake the products of one for those of the other.

Lastly, the plaintiff must show that the activity of the defendant carries an appreciable risk of damage or detriment to the plaintiff: i.e., that his potential customers may be diverted, or his reputation may be degraded, and so forth.

Even though proof of actual confusion and actual harm are not strictly necessary to found an action in passing off, and despite that fact that (under the statutory version at least) the plaintiff and defendant need not be in direct competition for the same market, it can be surmised that the elements of a successful suit

will not be easy to prove. Insofar as most professional designations make use of terms which are largely common to the trade or descriptive, the difficulty will be compounded. Sets of designatory initials are also likely to encounter this problem, although they have been protected (and even registered) in some cases. It is not to be readily expected that courts will intervene to protect the use of general occupation-describing words or phrases, unless, under the doctrine of "secondary meaning," the general terms have come to acquire a narrowly distinctive meaning in fact in the minds of the public. The use of imprimaturs in combination with narrow generic terms (e.g., "certified X.Y.Z.") will perhaps be more likely to found some protection, since, considered as a whole, the designation may be fairly distinctive.

The use of passing off actions (in those -- relatively few -- cases where the remedy is available at all) is plagued by problems of procedure. It seems that an association itself -- whether or not it is incorporated -- is capable of acquiring such a remedial right, although it is not the association but the individual members who make use of the sign in a commercial context. It is also open to the individual member(s) to act in a sole or representative capacity, leading to greater foreseeable difficulties in framing the action, bearing cost risks and so on.

In terms of swiftness, certainty and cost-efficiency, passing off actions seem to be distinctly inferior as a means of protecting professional titles. Both substantively and procedurally the right

to prevent non-members from adopting the same or a confusingly similar designation appears to be prohibitively difficult in most conceivable cases. (It should be noted that, where available, the remedies for passing off are injunctive relief and either damages or an accounting of profits. Thus the potential benefits of success are identical to those provided in relation to registered trade marks.)

The law of copyright, as embodied in the Copyright Act, R.S.C. 1970, c. C-30 must be raised only to be dismissed. While the unauthorized copying or display of a certificate of membership or some other original literary composition containing a professional designation may be an infringement of copyright, it seems that the mere use of a professional title alone will generally not amount to a valid subject of protection under the Act. That is, one cannot copyright the use of "X.Y.Z." after one's name.

The various provisions relating to misleading or fraudulent advertising/representations afford some potential indirect protection for professional titles --indirect in the sense that they do not look to the interest of the professional in his title but to the actions of the alleged offender towards the public or third persons.

As with the summary conviction offences provided by statutory protection of a designation, there is no requirement that the charge be initiated by an "interested" person or body,

and the cost risks are not likely to be high for the person who commences the proceedings. There are , however, requirments which render the application of these provisions less than wide in this area.

The "unfair practices" section of the Ontario Business Practices Act, S.O. 1974, c. 131 provides for the issuance of restraining orders and the possibility of a fine in relation to false consumer representations, including claims of sponsorship, affiliation, etc. But the Act only covers a limited variety of services (social, recreational, educational or "in respect of" goods and real property) when offered or provided to non-commercial household consumers. The Criminal Code, R.S.C. 1970, c. C-34, the Combines Investigation Act, R.S.C. 1970, c. C-23 and the Trade Marks Act (supra.) attach sanctions to certain acts, which may encompass the unauthorized use of a professional title in the market for services. The Criminal Code covers forgery of trade marks and the making of false representations. As is appropriate for serious criminal sanctions, these offences require an intent to deceive or defraud (i.e., an intentional mens rea). The Trade Marks Act prohibits the use, in association with wares or services, of descriptions that are both actually false in a material respect as to character or quality and likely to mislead the public. The Combines Investigation Act merely prohibits the use of a representation that is false or misleading in a material respect, for the purpose of promoting the supply or use of a product.

All of these provisions present certain problems of application. Leaving aside the requirement of a criminal intent in the Criminal Code provisions, their scope is likely to be restricted by the requirement of a "material" misrepresentation or falsehood concerning the "quality" or "character" of the services offered or provided. For example, there is some doubt as to whether the provision of services which are identical in nature and competence to those provided by designated persons, but under an improperly assumed title, will constitute a wrong within the meaning of these prohibitions. The Business Practices Act is not subject to these questions of construction, but, as mentioned, it will often be inapplicable because of either or both of the nature of the consumer involved and the kind of services.

In sum, it can fairly be stated that only two truly effective avenues of protection are available to voluntary professional organizations for discouraging the unauthorized assumption of their professional designations by non-members: statutory status as a protected title and registration of the title as a trade mark or certification mark. These two means are not mutually exclusive. For example, a body having the right to a title under provincial legislation might also seek to have the title registered as a mark, which would afford it some protection in the civil sphere outside of the province. A registered trade mark is the only means which may be effected solely through the initiative of the professional group, since statutory protection

may only follow upon an act of the legislature. On the other hand, it may be that the average professional designation or set of designatory initials will not fall within the registration provisions of the Trade Marks Act.

The attainment of corporate status as a non-profit organization is not essential for the protection of a title. The corporations Acts merely ensure to some extent that corporations are not granted the same or confusingly similar names in themselves. In some areas --such as the ownership of registered certification marks-- the existence of a corporate entity distinct from the members of the association is useful. In other areas it serves no necessary (as opposed to merely convenient) function.

The other legal mechanisms which have been discussed must not be disregarded. However, in terms of their swiftness, certainty and cost risks they cannot be favourably compared with the two mechanisms above.

(2) For the purposes of the following passages one major assumption will be made. It will be assumed that there is some "public interest" involved in the phenomenon of professional designations.

When professional titles are displayed to consumers of services they may be seen as having two important "contents." First, it can be said that the sign is "informational," in that it will generally be taken as an indication of the possessor's professed area of competence or endeavour. This may be general (e.g., distinguishing accountants from non-accountants) or more specific (e.g., distinguishing a specialist from a general practitioner). Second, in some instances the sign will also have a "certification" content. That is, the designation may be framed so as to suggest that the possessor is offering some guarantee of minimum competence. It is implied that someone other than the possessor himself has evaluated the training and/or skills of the individual and ascertained that they meet certain minimum standards. It can be said that the latter content will always include the former; it must also be noted that the former can carry some implications of the latter. In other words, an "informational" sign may also suggest to some that the possessor has minimum competence at least in his field of endeavour. The difference is that the latter form of designation makes explicit the suggestion that minimum standards of competence are not merely professed but, to some extent at least, assured.

One can then make the assumption (and it is only that) that there is some public interest in ensuring that the suggested or implied contents of professional designations have some foundation in fact. For example, it would be misleading if a title such as "Professional X.Y.Z." or "Certified Z.Y.X." in fact meant no more than that the possessor could afford an entrance fee to a designating association, at least insofar as the typical consumer of his services was not aware of the latter fact.

Since it may be hypothesized that a protected right to use a particular professional title gives the possessor some potential competitive advantage in the market for his services --in that it is likely to influence consumer choices-- the question may be asked whether voluntary groups should be able to secure such a protected right, or even to use "suggestive" designations at all, without some assurance that the titles in question do in fact indicate some peculiar possession of skill and/or training not generally possessed by non-designated persons. At the same time, it could be said that there is a public interest in ensuring that professional titles which are "valid" in this sense are protected from unauthorized adoption by persons who are ineligible to carry them. It should be remembered in this regard that the "public" includes the professional organizations themselves, who will be interested in ensuring that the value of their "valid" titles is not diluted or degraded through the proliferation of "invalid" organizations and improperly assumed titles.

Having made the above assumption, it is possible to examine the various legal mechanisms which may be of avail to professional groups as means of protecting their chosen titles from the perspective of whether or not some public interest element is inherent in the process. That is, one may ask whether the right to protection is gained in a way which involves some representative of the public (i.e., someone who is publically accountable) or which inherently takes account of the public interest in ensuring the accuracy (or "validity") of the titles for which protection is sought.

From this point of view it can be said that the scheme of statutory protection of titles offers the most opportunity for public interest input. Since statutory status can only be gained through an act of the legislature, it follows that the mechanism for ensuring that the public interest is regarded is inherent in the process. Assuming that it possesses the resources and desire to do so, it is possible for the legislature to approach requests for statutory status on the basis that such rights will not be granted unless the organizations involved are structured so as to ensure (preferably on a continuing basis) that the minimum levels of skill and/or training suggested by their designations are accurate.²

The next highest level of public interest input will be available through the relevant Ministry when professional organizations seek to incorporate as non-profit associations.

The power to grant professional designations is a product of the approved objects of the corporation. In assessing an application for a grant of letters patent, the Minister acts at his (very largely unfettered) discretion, and is entitled to take account of the issues of public convenience and so on. As in the case of the legislature, it is possible for the Ministry to bring appropriate policy issues to bear on applications for corporate status, either on an ad hoc (organization by organization) basis or in the form of a uniform system of rules of thumb applied to all such assessments. This is, obviously, a more indirect and far less visible process than legislative action. Still, the Minister remains responsible to the legislature for his actions, so that more immediate public input is possible.³

The other possible methods of protecting a professional title --the action for passing off, registered trade marks and misleading advertising provisions-- really provide no public interest component in this sense. In trade marks and passing off the question is whether consumers have come to rely in fact upon a given sign as a means of distinguishing the origin or source of certain services, not whether the sign is indeed "reliable" in its broader "informational" or "certification" content. Even where the use of a certification mark under the Trade Marks Act is involved, there is no scrutiny of the defined standard which is involved. The misleading advertising provisions may have some application to the improper adoption of professional titles, but they are unlikely to be construed as having any application to

to the question of whether a properly adopted title is in some way "misleading" in a material way as to the quality or character of the services offered by a designated person. As long as one is in fact "certified" by some organization, the issue of whether that "certification" has any real content is irrelevant.² Insofar, then, as these mechanisms directly or indirectly assist professional groups in discouraging the unauthorized use of their titles they may be valuable in preventing the dilution or degradation of "valid" titles. But they have no accompanying effect in first assuring that the titles are accurately suggestive when used by the voluntary associations' membership.

In fact, it must be said that none of these legal mechanisms, either alone or in combination, provides any uniform assurance that professional designations will in every case be "accurately" suggestive. Although incorporation (whether under a special statute or privately) is likely to prove convenient to any association with substantial resources and activities, it is not essential. Unincorporated bodies may adopt professional titles as they see fit. Even where the association does come under a statute or private letters patent which withholds the right to grant professional titles, there is generally no prohibition against the individual members themselves adopting whatever title they chose. (Of course, it could be provided that members are prohibited from using any title --a condition which would be unlikely to attract very many members.) It is fundamental that persons are free to describe themselves to others in the

manner of their own choosing, subject only to some explicit legal prohibition or to the threat of civil liability for intrusion upon the superior right to a title which has been established privately by some other person or body.

Footnotes

1. Of course, there are many other "public interest" issues involved in protected-title-certification schemes. For example, see Beatty and Gunderson, The Employed Professional: Accountants, Architects, Engineers and Lawyers in Ontario (P.O.C. Working Paper, 1978) at 52-55.
2. It may be said that this in fact has been done to some extent. The three organizations in Appendix 01 which have statutory protection also have standards for admission based on minimum levels of education and so forth.
3. Again, it may be that such policies have been pursued by the Ministries, at least at some level.
4. It is true that a person who sells "guaranteed" services with no intention of honouring the guarantee may offend these provisions. However, the "guarantees" suggested by professional titles are not quite of that nature.

The use of a title may amount to a representation that one is competent to perform a given function, such as to found some civil liability if one does not live up to the standard of care and skill which the title suggests. That is, persons who assert or imply that they possess skills beyond those of ordinary persons will be held to a standard of care and skill equal to that of the average possessor of such extraordinary skills in a suit based on negligence. But this has no real bearing on the topic under discussion.

CHAPTER III RESERVE OF TITLE UNDER THE QUEBEC PROFESSIONAL CODE

III. Introduction

The Quebec Professional Code, S.Q. 1973 c 43 as amended, is a direct outgrowth of a study undertaken by that province's Commission of Inquiry on Health and Social Welfare. In 1966 the Commission was given a broad mandate to study the question of professional organization in the health and welfare field. The report of the Commission of Inquiry in 1970 (the "Castonguay-Nepveu Report") included a recommendation that the Government consider the application of a uniform model to all of the major professions in Quebec.¹ It was felt both that there were particular problems in the various professional organizations and that the ad hoc approach had been partly responsible for these difficulties. This led to the tabling in the Quebec National Assembly of a draft Code along with numerous other bills concerning existing and proposed professional groups, and the creation of a legislative committee which carried out consultations and hearings involving interested parties. The recent Professional Code was ultimately adopted by the Assembly in 1978 and proclaimed in force early in 1974.²

The major innovations resulting from the new legislation are the application of uniform provisions to a large number of professional organizations (presently, 38),³ and the advent of the Office des Professions du Quebec, an agency with power to monitor the activities of the professional corporations under the Code and to make recommendations concerning the future organization of the professions in Quebec.

On the topic of professional designations the Professional Code is of interest for two reasons. The first is the inclusion within the Code of a category of "reserve of title" professional bodies. The second is that the present policy of the Offices des Professions du Quebec clearly favours the reserve of title mechanism as the major means of professional regulation in the future.⁴ The Office des Professions has placed its faith in certification, rather than licensure, as the method of regulating most new professional occupation of groups which may arise.

Section A, following, describes the general scheme of the Code and the roles of the various bodies involved. Section B examines the distinction between "reserved title" and "exclusive practice" corporations. The current policy of the Office des Professions in regard to the creation of new professional corporations is outlined. Section C addresses itself to the present situation of the reserved title corporations. Some complaints received by the Office des Professions are listed, and the

response of the Office is summarized. Finally, Section D considers some of the advantages and disadvantages of the system of reserved titles as compared with the procedures described in Chapter II of this paper.

III.A Scheme of the Professional Code

There are three levels of organization under the Professional Code: (1) the individual corporations, (2) the Quebec Interprofessional Council, and (3) the Offices des Professions du Quebec. These are described in turn.

(1) Section 23 of the Professional Code states:

The principal function of each corporation shall be to ensure that protection of the public.

For this purpose it must in particular supervise the practice of the profession by its members.

This provision is both definitional and horatory. It is clear that the framers of the Code intended to strictly separate the "competence" aspects of professional associations (i.e., those designed to ensure the policing of professional competence and integrity) from any concern with the self-interest of professionals.⁵

Section 2 states that, subject to the inconsistent provisions of any special Act, the Code applies to all "professional corporations," which are defined in s. 1(b) to include only those associations whose names appear in Schedule 1 of the Code or which are otherwise constituted in accordance with the Code. (Schedule 1 is reproduced in Exhibit B .) Professional or occupational groups are therefore free to organize themselves in other ways and carry on their usual activities, so long as they do not thereby infringe any of the provisions of the Code. Section 3 purports to guard against any confusion between Code and non-Code

bodies by providing that no body may refer to itself as a "professional corporation" unless it possesses that status under the Code.

The professional corporations could be said to retain much of the day-to-day autonomy traditionally associated with the self-regulating professions. They remain immediately responsible for admitting members, setting standards of practice, policing the competence and conduct of members, receiving complaints, conducting disciplinary proceedings, and so forth. At the same time, the corporations are subject to a number of organizational and procedural requirements, and to the scrutiny of the Office des Professions.

Each corporation is required to establish and maintain a Discipline Committee and a Professional Inspection Committee. The latter is charged with supervising the competence and integrity of members (in a prophylactic sense). It may inquire into the competence of an individual whose abilities are called into question and can recommend that a member be required to undertake continuing education (ss. 110 and 111). The Discipline Committee receives complaints and conducts hearings regarding professional misconduct, which may lead to the traditional penalties of suspension, expulsion, and so on (ss. 114 ff.). A uniform procedure for disciplinary matters is prescribed by the Code. An appeal from any decision lies at the instance of the corporation or the accused to an omnibus

Professions Tribunal composed of five Provincial Court judges, sitting in panels of three, whose determination is final (see ss. 158-172).

The affairs in general of each corporation are supervised by a Bureau, composed of an elected president and either 8, 16 or 24 directors, according to whether the membership is less than 500, between 500 and 1,500, or greater than 1,500 persons (s. 60). Of these directors, 2, 3 or 4, respectively, are lay persons appointed by the Bureau by the Offices des Professions. Lay directors are remunerated by the Office. The remaining directors are elected by and from the membership, organized into electoral districts (ss. 65 ff.). Section 84 requires each Bureau to adopt by resolution rules relating to the roll of members, the appointment of committees and officers, the recognition of equivalent academic qualifications for non-Quebec applicants, and the organization of refresher or training courses. Subsection (m) provides that the Bureau in general shall,

give any advice it considers expedient to the Minister, the Office, the Interprofessional Council, teaching establishments or any other person or body it sees fit.

In addition, each Bureau is required to establish by regulation a code of ethics (s. 85), an arbitration procedure for settling fee disputes between professionals and their clients (s. 86), rules covering professional advertising (s. 90), and the procedure of the Professional Inspection Committee (s. 88).

Where members are required by the nature of their activities to hold money or other securities for their clients, the Bureau must establish a client indemnity fund (s. 87). Section 92, in paragraphs (a) through (l), further specifies the Bureaus' duty to control by regulation various standards of practice. All regulations are subject to approval by the Lieutenant-Governor in Council (s.93).

It is worth noting that, while the corporations remain responsible for the mechanics of admitting members, a number of common provisions impose standards in relation to the issues of citizenship, transferees and temporary enrolements (ss. 40 ff.) Some major decisions regarding admissions are removed from the individual corporations. For example, while s. 84 charges the Bureaus with setting standards of equivalence for extra-provincial education and experience, s. 178 gives to the Lieutenant-Governor in Council the power to regulate which Quebec academic degrees shall be recognized for admission and specialist status.

Finally, the Bureaus are empowered to set and collect membership fees to support the activities of the corporations. Two interesting provisions, however, are added. Section 267 states that corporations may be granted an annual subsidy to ensure that they have sufficient resources to meet their obligations under the Code. Sections 12(t) and (14) together provide that the Office des Professions shall oversee the financial stability of the corporations, and may have placed under its control by the Lieutenant-Governor the affairs of a corporation which shows a deficit or

insufficient income.

(2) The Quebec Interprofessional Council is a general advisory body, composed of the presidents of the professional corporations (or their representatives) and supported by an annual levy on the individual corporations (ss. 20 and 21). It can be seen from various sections of the Code that the Interprofessional Council is designed to provide advice on matters where the combined expertise and concern of the corporations may be important. Thus, the granting of letters patent to new reserved title corporations (s. 27) and the creation of regulations concerning indemnity funds or annual reports (s. 177) require consultation by the Lieutenant-Governor with both the Council and the Office des Professions. The more general function of the Interprofessional Council is set out in s. 19, as follows:

In addition to the other functions conferred upon it by law, the Interprofessional Council:

(a) may study problems of a general nature encountered by the professional corporations and communicate to the interested corporations its findings together with the recommendations considered appropriate;

(b) may invite professional groups, whether or not recognized as professional corporations, whose members are engaged in related activities to meet and find a solution to their problems;

(c) may hear any professional group wishing to be recognized as a professional corporation and submit to the Lieutenant Governor in Council and to the Office the recommendations it considers appropriate in respect to the recognition of such group.

The Council must make a yearly report of its activities to the Quebec National Assembly. The creation of the Interprofessional Council seems designed to ensure that both Code and non-Code professionals have a common meeting place or forum, from which any issues raised will be brought to the attention of the Government.

(3) The Office des Professions du Quebec is at present the only agency of its kind in Canada. It consists of five members appointed by the Lieutenant-Governor in Council, plus a support staff involved in both theoretical and concrete research on professional activities. Three of the members must be appointed from a list containing a minimum of five nominees chosen by the Interprofessional Council. The Lieutenant-Governor is responsible for selecting the chairman and vice-chairman, who are appointed for terms not exceeding ten years. The remaining three members sit for three-year terms. All members of the Office des Professions must be domiciled in Quebec and enroled in one of the professional corporations (see ss. 3 ff.).

The function of the Office is twofold. Its immediate duty is to monitor the compliance of the individual corporations with the obligations imposed upon them by the Code. On a long-range basis its role is advisory, and in that regard it effectively acts (albeit through the Lieutenant-Governor) to shape the general organization of the professions in Quebec, both under the Code and to some extent outside of it.

Section 12 states:

The function of the Office shall be to see that each corporation ensures the protection of the public.

It shall, when it considers it expedient, suggest the establishment of new corporations or the amalgamation or dissolution of existing corporation and amendments to the acts governing them; it shall endeavour to bring the corporations to work together to find solutions for common problems they encounter, by reason, in particular, of the relatedness of activities exercised by their members; it shall suggest ways to ensure the best possible for professions; it shall make recommendations concerning the regulations and by-laws of professional corporations.

Following this preamble paragraphs (a) through (w) of s. 12 charge the Office with specific duties relating mainly to matters of the structure and procedures of the corporations. Under subsections (a) to (p), for example, the Office must undertake to see that each corporation adopts the code of ethics, arbitration procedure, standards of practice, and so forth required by the Code or any special Act. If a corporation fails to fulfill any such obligation within a time limit set by the Office, the Office itself may make the appropriate regulations. These particular powers are supplemented by a general power to (under ss. 84(q) and 84(r), respectively), to

suggest, if need be, to a corporation amendments it considers necessary to make to the regulations contemplated in paragraphs a to p;

adopt, by regulation, the amendments that it considers necessary to make to the regulations . . . if a corporation fails to adopt such amendments within the delay set by the Office.

As in the case of the corporations, s. 13 enacts that any proposed regulation must gain the approval of the Lieutenant-Governor in Council.

The tenor of s. 12 indicates that the Office should be involved with more than simply seeing that the corporations follow the required procedures. It is empowered to supervise the substantive content of the rules and regulations formulated, from the perspective of their effect on "the protection of the public."

In its advisory capacity, the Office is charged with formulating policies on the nature of professionalism in general. Its concerns include ensuring that supply conditions, interprofessional relationships, standards of education, and so on, are optimized. Its focus reaches beyond the admissions and competence-oriented problems dealt with by the Code to include such questions as the unionization of professionals and the situation of employed professionals.⁶

Since its inception the Office des Professions has issued an annual Rapport d'Activities. These copies of the Office's mandatory report to the Minister responsible for the professional legislation should be consulted for an indication of the projects undertaken and planned by the Office.⁷ To date, the Office seems to have been largely occupied with the transition from pre- to post-Code conditions in the corporations, and with a general research project now published as The Evolution of Professionalism In Quebec.⁸

The Office presently maintains four sub-departments which gather information on the professions, conduct analytic research, provide legal counsel to the Office, and distribute information on the Office's activities and policies to the public.⁹ As part of the latter function, the Office has published a brochure outlining the rights of consumers of professional services and indicating which professionals are subject to the Code.

It is likely that many of the particular activities of the Office des Professions will change over time. One central duty should, however, remain constant: the consideration of requests for professional status under the Code. The Office has primary responsibility for recommending the creation or dissolution of professional corporations and their appropriate legal status. Indeed, one draft of the Professional Code contained a proposed s. 25 which would have prohibited the presentation to the legislature of a bill establishing or amending a professional corporation by anyone other than a member of the "Executive Council" (the Office). Although this provision was dropped (and would have been constitutionally ineffective in any case), it seems likely that few, if any, such matters will be handled in future without the participation of the Office des Professions.¹⁰

III.B Reserve of title status under the Professional Code

The Professional Code provides for two categories of professional corporations: those whose members enjoy a protected right to the use of a particular designation in association with their work ("reserve of title") and those whose members in addition have the exclusive right to engage in a defined field of activity ("exclusive practice"). Members of the latter corporations, in other words, must be licensed to practice their calling, while members of the former are licensed only to carry a particular title. In effect, reserve of title is a certification scheme within Friedman's definition.¹¹ Membership is voluntary, while membership in an exclusive practice profession is compulsory.

Both types of corporation are under the same general requirements relating to their structure and the duty to supervise the practice of their members. Exclusive practice professions are also, however, governed by specific statutes. The Code therefore, applies to those bodies only to the extent to which it is not inconsistent with such other legislation (per s.2). At present, the reserved title corporations are governed solely by the Code and the regulations thereunder. This distinction does not, for the purposes of this paper, affect the question of their legal status in any major way other than that the specific Acts will necessarily contain definitions of the areas of exclusive practice, since these are not provided within the Code. These Acts underwent revision simultaneously with the passing of the Professional Code and are relatively uniform in content.

One interesting feature of these revisions is the attempt to provide in each case that the exclusive practice professions must indicate by regulation which acts performed by their members may be delegated to non-members (paraprofessionals, other professionals, etc.). A duty to see that this is done is placed upon the Office des Professions by s. 84 of the Code.¹²

The one fundamental difference between reserved title and exclusive practice professionals is, as mentioned, that anyone who wishes may (provided he is otherwise free in law) offer and carry out services in the same area as reserved title practitioners, so long as he does not infringe their protected right. The mechanism is, therefore, similar to that instituted by special Act in Ontario for management accountants (R.I.A.'s).¹³ In some cases reserved title professionals have exclusive use of a generic title; in others the main element is an imprimatur. At bottom what is prohibited is a claim of affiliation with any Code-recognized body by non-members.

Part (1), following, examines the definition and offence provisions relating to reserved title. Part (2) describes the process for creation of new professional corporations. It is further sub-divided into a consideration of (a) the statutory criteria and (b) the published policy of the Office des Professions.

(1) There is no generally-worded provision prohibiting the unauthorized use of reserved titles by non-registrants. Rather, the titles reserved in each case to members of the corporations listed in Schedule 1 of the Code are dealt with individually under paragraphs (a) to (p) of s. 36. These subsections are quite similar in wording. To choose one example, s. 36(a) states that no person shall,

use the title "Registered Industrial Accountant" or any title comprising such expression or the equivalent, or use the initial "R.I.A.." unless he holds a valid permit for that purpose and is entered on to roll of the Professional Corporation of Industrial Accountants of Quebec.

The prohibition in s. 36 is tempered for transferees by s. 39:

Notwithstanding section 36, the president of a corporation may by special authorization empower a person legally authorized to practise outside the Province the same profession as the members of such corporation to use the title reserved to members of the corporation.

Such authorization shall be valid for three months and shall be renewed only by the Bureau.

If the president refuses to grant the authorization applied for, the application, therefore, may be made to the Bureau, and its decision, in this respect shall be final.

The requirement that persons be "legally authorized to practice" outside Quebec seems strange, since reserved title status is not itself a legal authorization to practise but only to use a given title. In this sense, unless specifically barred from practice, every one is "legally authorized." In cases where a particular profession is, outside Quebec, subject to licensure

this requirement would arguably serve to prevent non-licensees from being granted a temporary permit to use a given title, since they would not be "legally authorized" to practise outside the province. Why this should be so is uncertain, since no license to practise is required inside Quebec. It could be theorized that s. 39 is framed so as to discourage an influx of persons who are not able to practise in their own jurisdictions (e.g., to prevent persons who are ineligible for licensing in Ontario from crossing the border in order to practise a profession which only entails reserved title in Quebec). But the temporary right to use a title is not much of an inducement, since persons can only acquire the long-term right to use a reserved title by meeting the requirements for membership in a corporation. If a person can meet those requirements there seems to be no reason to impede his initial entrance into Quebec on the basis that he does not meet the requirements of a different form of regulatory body in another jurisdiction. No mention is made in s. 39 of a requirement for equivalent qualifications. The power, however is discretionary, and it has already been noted that the Bureaus are charged with making rules covering equivalence standards.

In addition, under s. 36 it is not possible to say with certainty how the phrase "or the equivalent" may be construed in every case, either judicially or in administrative practice. It will be especially important for other groups to know what may be

considered an equivalent designation when the reserved title consists of the usual generic title of their calling (e.g., as in s. 36(p) for "Nursing Assistants"). It is also noteworthy that there is no specific prohibition against the use of any form of words which might otherwise imply to a consumer that the user is entitled to be, or is, the holder of a permit, yet this would seem to be a central danger for abuse of a certification scheme. It is possible that the phrase "or the equivalent" will be extended to cover this phenomenon.

It is submitted that a purposive reading of s. 36 will assist in defining its scope. Since reserve of title status does not purport to restrict the right to organize and practice in any way, there is no reason to conclude that it should unnecessarily hamper the ability of non-members to advertise and/or certify themselves through the formation of an organization and the adoption of some designation designed to indicate their area of work or qualifications. By way of contrast, s. 32, which deals with exclusive practice professionals, states that "[n]o person shall claim to be . . . or use any title which may lead to the belief that he is " one of the relevant professionals. This is very wide in its application. Obviously, s. 32 purports to stop the use of any designation whatsoever which suggests that the user practices in a given field, while s. 36 should not be construed so as to directly or indirectly accomplish this in effect.

Still, one cannot be too positive about the scope of the prohibitions in s. 36. For example, where a three-word title is covered (as in s. 36(a)), would use of two or one of the words involved be taken as "comprising the expression" or "the equivalent"? Surely a voluntary association of, for instance, 'Accredited Business Internal Auditors' who called themselves 'A.B.I.A.'s' and performed precisely the same functions as "R.I.A.'s" would not violate the Code under any reasonable construction. What, though, of the case of 'Industrial Auditors' who called themselves "I.A.'s" (and otherwise made no pretence to registered status)? Perhaps in any given case -- short of including the whole of the protected title within a longer designation -- a court would look to the degree of appreciable risk of confusion in deciding whether equivalence was present. It is suggested that some use of the actual words or of a designation creating a very substantially similar impression through both form and content would be required to clearly violate the Code. It is legitimate to guard against the confusion of potential consumers; it would not necessarily be congruent with the intent of the Code to effectively prohibit non-confusing use of informational or certifying designations by others. Yet this latter effect is possible in some cases under the Code. Where the usual generic description of an occupation (e.g., "Nursing Assistant") is protected -- rather than some imprimatur (e.g., "Registered X.Y.") -- non-members may find themselves at a disabling disadvantage. In effect, persons could

be compelled to join a voluntary corporation because of the difficulty of practising without the right to use the term which is most commonly recognized by consumers. It is one thing for a professional corporation to convince consumers that its members offer the best guarantee of competence, so as to achieve de facto licensing powers through a decision on the part of consumers to seek only members' services. It is another thing to effectively ensure this by simply taking away from non-members the right to use a generic description of themselves, thus making it difficult for consumers to even be aware of the possibility of retaining non-members' services. Nothing in the Code indicates that such problems were considered in granting exclusive rights to such titles as "Social Worker" (s. 36(d)) and "Physiotherapist" (s. 36(n)).

(Parenthetically, it seems that the unfair competition laws would also provide recourse for the professional corporations. One difficulty -- at least "philosophically"-- is that a corporation which presumably must not be actively involved in the protection of its members' self-interest might have to claim an economic proprietary interest in their title. However, it can be argued that in regard to the confusing use of title the public interest and the members' pecuniary interest overlap.)

Section 182 of the Code provides the penalty for a transgression of s. 36:

Every person who contravenes a provision of this Code or the act or letters patent constituting a corporation is guilty of an offence and is liable on summary proceeding to a fine of not less than two thousand dollars.

The wording ensures that a legislative amendment to the Code is not necessary in order to provide protection of title for new corporations. The Lieutenant-Governor in Council may provide in the letters patent for a reserved title which is not included in the specific subsections of s. 36.

Injunctive relief is supplied under s. 185, which states:

If a person repeats the offences contemplated in s. 182, the Attorney-General or, following his authorization and upon a resolution from its Bureau, the interested corporation, after penal proceedings have been instituted, may require of the Superior Court an interlocutory writ of injunction enjoining that person or his officers, agents or employees to cease the commission of the offences charged until final judgment is pronounced in penal proceedings.

After pronouncing such judgement, the Superior Court shall itself render final judgment on the application for an injunction.

The Attorney-General and the interested corporation are dispensed from the obligation to give security to obtain a writ of injunction . . .

Interestingly, s. 185 requires the authorization of the Attorney-General for any requested injunction. In principal it can be argued that the initiation of court proceedings should not rest in the hands of an interested corporation, since professional bodies may use such power (or simply the threat of its exercise) in the service of their members' self-interest. Section 185 meets this potential criticism by requiring a public official to oversee such actions.

There is no provision for injunctive relief apart from a prosecution. Presumably, a permanent injunction would only be granted following conviction of the offence charged. This may be a preferable position in terms of ensuring the freedoms of non-members, since the initial quasi-criminal burden of proof of harmful activity would be higher than that required to show actual or potential harm deserving to be enjoined to a civil standard. Notably there is no attempt to formally distinguish between offences against reserved title status and exclusive practice status in regard to maximum or minimum fines, nor are terms of imprisonment in lieu of, or in addition to, fines provided.

Section 183 may imply that a charge under s. 182 can only be laid by either the Attorney-General or the corporation concerned. It states:

Any proceedings related to the unlawful practice of a profession or the unauthorized use of a reserved title may be instituted by the Attorney-General or, upon a resolution by its Bureau by the corporation concerned.

Will the word "may" in this section be construed as permissive or mandatory? It is the norm that prosecution under public laws may be initiated by any person having the knowledge, or reasonable and probable grounds to believe, that an offence has been committed. While an application for injunctive relief by a corporation needs the authority of the Attorney-General, the initiation of a prosecution does not specifically require this. Of course, the Crown does have the authority to step in, either by taking over the prosecution or entering a stay of the proceedings. A direct provision is, therefore, not strictly necessary.

The disposition of fines levied under s. 182 is affected by the manner in which the proceedings were commenced (although not by whether they were conducted by the Crown or counsel retained by the corporation). Section 184 enacts that:

When proceedings relating to the unlawful practice of a profession or the unauthorized use of a reserved title are instituted by the Attorney-General, the fine levied shall be paid into the consolidated revenue fund; when such proceedings are instituted by the corporation, the fine levied shall be paid to it.

(Note that s. 184 does not contemplate the commencement of a prosecution by a private citizen. This reinforces a mandatory construction of s. 183.)

In effect, although no obligation to police the prohibition is placed on the corporations, an incentive to do so may be. It is not possible to say, in the absence of evidence whether s. 184 is an appropriate form of recompense for resources expended by the corporation in enforcing the law, is a profitable means of bolstering the corporate coffers, or simply provides no effective incentive at all. Ideally, as in the case of any offence, enforcement of the law should lead to an eventual lack of need to enforce it. It is not possible to say, therefore, that s. 183 may be aggressively used with the aim of generating revenue, since frequent prosecutions are likely to eliminate future transgressions. In any case, it may not be realistic to say that fines would generate revenues of any appreciable quantity. There is no prima facie reason to believe that s. 184 would cause problems. Fears have been expressed, however, that professional bodies can -- advertently or otherwise -- abuse the power to initiate prosecutions and collect fines in quasi-criminal matters or regulatory offences, and the payment of fines to persons rather than the State as a whole has been condemned on principle.¹⁴

Finally, it should be noted that the Professional Code includes one provision which would not be generally expected in a statute granting protection of titles. Section 37 contains a list of positive statements regarding the activities which members of reserved title corporations may pursue. For example, it states:

Every member of one of the following professional corporations may engage in the following professional activities in addition to those otherwise allowed him by law:

(a) the Professional Corporation of Industrial Accountants of Quebec: establish cost accounting, do industrial accounting and organize and manage business.

Section 38, immediately following, emphasizes that:

Nothing in this division shall be interpreted as giving to members of a corporation to which it applies the exclusive right to engage in the activities described in section 37 or in the letters patent constituting such corporations.

Clearly, s. 37 does not act as a comprehensive definition of the practice of (say) industrial accounting -- at least not in the same sense as such definitions operate in exclusive practice regimes. Its precise purpose is, therefore, difficult to discern (and s. 37 is rarely, if ever, mentioned in the literature distributed by the Office des Professions). The subsections of s. 37 may have been included in the Code to ensure that the freedom to practice of persons working in those areas is not encroached upon through interpretation of the definitions of practice which may be provided for related corporations that enjoy exclusivity

or practice. (This is not to say that areas of practice cannot be legislatively reserved to certain persons. Under s. 2 the Code is overridden by the inconsistent provisions of another Act.) Read in this way, s. 37 would reinforce the thrust of the requirement that exclusive practice professions determine by regulation those acts which may be performed by non-members.¹⁵ Both may be designed to guarantee a certain flexibility in the boundaries around areas of exclusive practice. (If this surmised rationale is correct, though, why does s. 37 not state that "every one" who so desires may engage in the listed activities?)

(2) The Professional Code explicitly anticipates the formation of new professional corporations, as well as the possibility of dissolving or amalgamating existing corporations. The following sections describe (a) the statutory criteria to be applied and (b) the publicized policy of the Office des Professions in this area.

(a) Section 24 of the Code provides that every professional corporation "shall be incorporated by an act or by letters patent issued under this Code." By s. 27, the Lieutenant-Governor in Council, after consultation with the Interprofessional Council and the Office des Professions, has authority to,

... incorporate by letters patent any professional corporation which groups the persons he deems it necessary, for the protection of the public, to grant a reserved title.

It remains open to the Legislature to create such bodies by amending the Code or approving a separate statute. (It has been mentioned, however, that this is unlikely to be resorted to by the Legislature.). There is no similar power in the Lieutenant-Governor with regard to exclusive practice corporations. These must, under s. 26, be created by an Act.

In practice, the decision to grant or refuse status under the Code will be a direct product of the Office's recommendation. In coming to such a decision, the Office should first of all be guided by the general injunction in s. 23 ("the principal function of each corporation shall be to ensure the protection of the public"), which is echoed in s. 27. In addition, the Code sets out five specific criteria to be considered in every case. Section 25 states:

To determine if a professional corporation should or should not be incorporated, account shall be taken particularly of the following factors:

(1) the knowledge required to engage in the activities of the persons who would be governed by the corporation which it is proposed to incorporate;

(2) the degree of independence enjoyed by the persons who would be members of the corporation in engaging in the activities concerned, and the difficulty which persons not having the same training and qualifications would have in assessing those activities;

(3) the personal nature of the relationships between such persons and those having recourse to their services, by reason of the special trust which the latter must place in them, particularly because such persons provide them with care or administer their property;

(4) the gravity of the prejudice or damage which might be sustained by those who have recourse to the services of such persons because their competence or integrity was not supervised by the corporation;

(5) the confidential nature of the information which such persons are called upon to have in practising their profession.

Once the decision has been made to recommend the recognition of a professional corporation, the question arises whether members should be granted exclusive practice rights or simply a protected title. Section 26 accordingly provides:

The members of a corporation shall not be granted the exclusive right to practise a profession except by an act; that right must not be granted except in cases where the acts done by these persons are of such a nature and the freedom to act they have by reason of the nature of their ordinary working conditions are such that for the protection of the public they cannot be done by persons not having the training and qualifications required to be members of the corporation.

Superficially, the Code would seem to impose a relatively simple two-threshold approach: corporations whose members require extensive or specialized knowledge not easily acquired or understood by their clients, are largely self-employed, and so forth, would be eligible for status under the Code, while those corporations which could show in addition that the nature of their professional activity fell within s. 26 would be eligible for exclusive practice rights.

The statutory criteria, however, do not have a completely hard or objective content. They focus attention on the working conditions or environment of normal practice and the gravity of possible prejudice attendant on unsupervised activity as prime factors.¹⁶ In this sense, the Code adopts the traditional rationales for professional regulation: the inability of consumers to evaluate the quality of services, a lack of third-party scrutiny of their performance, and the intolerability for consumers (and society at large) of the possible costs of incompetence.¹⁷ No indication, though, is given of the extent to which each of the enumerated factors should be present before a particular status will be recommended. This is equally true in those cases where the Office may be considering the withdrawal of status as professional corporation.

(b) In an attempt to come to grips with this lack of hard guidance, the Office des Professions undertook a number of studies. Having despaired of ever defining "professionalism" as a particular quality or of distinguishing professionals from non-professionals on the basis of educational requirements, the Office carried out a statistical study of a group of professional bodies which had existed under statute prior to the coming into force of the new legislation. In examining these groups the Office did not look to the question of whether or not their activities were inherently such as to require some form of public protection oriented regulation. Rather, the associations were polled to discover the quantitative level of their operation in

seven selected areas, chosen as indicators that the bodies were engaged in ensuring the protection of the public. In other words, attention was directed to the extent to which these organizations, in the absence of the Professional Code, had been both motivated and able to engage in the following activities (apparently regardless of whether they had been required by law to do so):

- i) setting standards for admission,
- ii) providing discipline committees,
- iii) providing continuing education for members;
- iv) maintaining client information services;
- v) setting standards of practice,
- vi) prosecuting unauthorized practice, and
- vii) publishing some form of professional periodical.¹⁸

An attempt was then made to determine whether the level of activity in these areas was influenced by the following ten characteristics:

- i) size of membership,
- ii) annual income of the organization,
- iii) average age of the members,
- iv) sex distribution of the members,
- v) legal status of the corporation (i.e., whether having a protected title or rights of practice),
- vi) year of incorporation of the organization,
- vii) proportion of members in private practice,
- viii) concentration of members in Montreal and Quebec,
- ix) nature of the clientele, and

x) level of education required for admission.¹⁹

The results of this study are too complex to be stated briefly. The reader is referred to The Evolution of the Professions in Quebec for a full account. The general conclusions of the Office based on this study can be summarized.

On the issue of whether to recommend recognition of a group as a professional corporation, the Office has stated that it will "insist" that the association in question has the following characteristics:

- (1) a large proportion of the membership engaged in private practice,
- (2) dealing with a mainly individual clientele,
- (3) a field of knowledge which renders it difficult to supervise the activities of members by any other means,
- (4) substantial financial resources available to fund the operation of the organization, and
- (5) a large membership.²⁰

A relative weighing of these factors is not really provided, other than to say that the first three will have some precedence in concern over the latter two. Prediction in each given case is, therefore, precluded. For example, an organization whose members worked under conditions (1), (2), and (3) above would, if brought under the Code, be eligible for operating cost subsidies. A lack of resources could, therefore, be influential but not necessarily decisive. Similarly, it is conceivable that

persons could be employed workers, yet relatively unsupervised by employers who find it difficult to make sophisticated assessments of quality.

When confronted with an application from a group possessing the qualities found in (1), (2) and (3) above, but lacking in resources and a large membership -- and always assuming the possibility of prejudice arising from unregulated activity is present -- the Office des Professions has stated that it intends to propose some form of control outside the Code:

. . . periodic inspections and control undertaken by a Ministry or Government Agency directly involved; direct control by l'Office des professions; joint control by l'Office and a Government Agency, or by l'Office and a professional corporation whose knowledge seems essential for supervising the activity in question.²¹

Moreover, should the organization be involved in roughly the same field of activity, with essentially similar levels of education, the Office indicates that it will encourage the integration or amalgamation of groups, rather than the creation of additional discrete organizations.²²

Given that an organization is recognized for corporate status under the Code, the Office des Professions has interpreted s. 26 as a sign of the Legislature's reluctance to see the proliferation of areas of exclusive practice. Accordingly, the Office has stated that,

. . . the most realistic position is to assess for each group involved whether, on the level of public protection, the advantages of a monopoly of practice outweigh the potential disadvantages in other respects.

. . . l'Office intends to propose to the Government that it grant exclusive right to practise to members of a corporation only when the particular conditions of professional practice guarantee that this mechanism will be capable of offsetting the economic and social difficulties inherent in its application.²³

The Office's announced policy would seem to be the result of two primary factors. One is that the study of professional groups tended to indicate that legal status alone had little significant influence on the motivation and ability of groups to carry out activities related to public protection. When the professional association had a large membership (i.e., over 1,500), large financial resources (i.e., over \$150,000 per annum), in excess of 35% of its members in private practice, a mainly individual clientele, and a long existence as a group, the intensity of the correlation between the possession of exclusive practice rights and a high level of activity in the seven selected areas was relatively strong. In the absence of such conditions of practice and organizational resources, associations tended to demonstrate a low level of activity, regardless of their legal status. The conclusion was drawn that a particular legal status alone is no assurance that an organization will develop the requisite level of activity with any ease.

The second factor is the acceptance by the Office des Professions of the view that monopolies of practice will almost

always create more ills than they cure. This is premised on two considerations: the inherent problems of monopoly schemes and the incompatibility of exclusive practice regimes with current social conditions. On the first ground, the Office in its publications emphasizes that exclusive practice presents difficulties of definition in separating areas of work, the possibility of generating friction rather than co-operation between complementary and interdependant fields, and the danger that the effects of a monopoly on the supply of services will override any benefits.²⁴ On the second ground, the Office points to the increasing tendency for professionals to be employed rather than independent and the concomitant need to adapt professional regulation to the salarization of manpower, as well as the rapid (and, foreseeably, constant) development of new modes of practice or areas of specialized knowledge coupled with the demand for interdisciplinary services.²⁵

On the basis of the above, the Office concludes that, assuming corporation status is advisable at all, reserve of title will be favoured. It asserts that this mechanism is adequate when the persons involved generally work as employees, and are thereby subject to a structured environment, with standards for recruitment and supervision provided by employers who are (presumably) in a position to judge the quality of services rendered.²⁶ (The statement that these factors provide the rationale for selecting reserve of title over exclusive practice seems partly out of place. The presence of such conditions of practice to a large extent would presumably preclude the need

for any form of corporate status under the Code. When consumers of services are able to make, and act on, intelligent price-quality evaluations the traditional reason for professional regulation would seem to be absent. Of course, this may be a matter of degree. Moreover, this argument may be so patent an inference from the contents of s. 25 that the Office does not emphasize it when discussing the initial threshold decision.). Since these particular conditions of practice, along with the development of segmented fields of knowledge, are seen as likely to increase in the future, the Office des Professions has concluded that,

. . . without presupposing the decisions it will have to take in each separate case, l'Office anticipates that the protection of the public will, in future, be ensured most often by identifying the people offering guarantees of competence in a specific sector, by means of a reserve of title recognized by the public at large.²⁷

III.C Present situation of reserved title corporations

The reserve of title mechanism has not been without its detractors -- particularly, it seems, from among those directly involved. The Office des Professions indicates that it has received complaints from the present reserved title corporations, along with requests from these same bodies that they be elevated to exclusive practice status.

Since professional associations with statutory reserve of title have been in existence longer than the Professional Code it appears unlikely that these complaints are totally related to the new law. Rather, they more probably concern perceived difficulties on the part of professional organizations as a whole which do not control rights of practice. Still, it may be that the obligations imposed by the Code have heightened some difficulties or created new ones. Also, requests for licensure status, though couched in other terms, may be consciously or unconsciously influenced by matters of self-interest. No attempt is made in the following paragraphs to speculatively separate these factors. Parts (1) and (2) simply outline the nature of the complaints received and briefly describe the public response of the Office des Professions.

(1) According to the Office's anecdotal reports of interviews with representatives of the reserved title corporations, these bodies perceive difficulties in the following areas: Some

corporations stressed problems in recruiting eligible members. It was further claimed by some that the corporations are reluctant to conduct vigilant discipline and professional inspection of members when offenders could simply leave the organization thereafter and continue to practise without the particular title. Similarly, the fear was expressed that such factors as fee increases and random professional inspections may drive practitioners from the corporation or keep potential entrants from coming forward. It was also claimed that charlatanism and the unauthorized use of titles were frequent, yet more difficult to police than unlawful practice of a protected occupation. On the whole, representations were made that members of such bodies regard the benefits of belonging as being overshadowed by the costs. This, it is claimed, precludes the corporations from effectively fulfilling their role as protectors of the public, both because they lack the full source of income which mandatory membership would provide, and because they do not have a sufficiently comprehensive control over the practice of their respective occupations. Of course, by its very nature, a certification regime does not necessarily remove incompetent persons from the services market. "With the situation as it is, the representatives claim that no one believes in the effectiveness of the reserve of title mechanism, either as a means of protecting the public or of defending the interests of its members in the same way as a union does."²⁸

Whether professional corporations with reserve of title

should be involved in the fence of their members' interests is surely a point of contention, given the potential for divergence between public and private goals. One impetus behind the Code's creation was the desire to ensure that self-regulating professionals did not use their delegated powers to further members' interests; it was sought to exclude this function from the admitting and practice-supervising bodies, while leaving professionals free to form other groups for such purposes.²⁹

(No such argument is raised in the Office's response at this point.) Still, the complaint itself brings to light a central feature of voluntary designating schemes: all other factors being equal, a professional title which has no marginal value to the practitioner in the market for his services is unlikely to attract voluntary membership. One can well imagine that a costly organization which seems ineffective in policing incompetence on the one hand and is not perceived by members to offer some possible market return on the other might appear to be the worst of both worlds.

(2) In responding negatively to these complaints, the Office des Professions has addressed this latter problem.

Their words bear repeating:

It is not an easy task to assess the effectiveness of the reserve of title mechanism as a means of public protection. Even though many people consider it ineffective, there is no proof that such is the case in all professional sectors, nor that, if it is the case, the situation cannot be changed. A priori, it is permissible to think that nothing prevents a corporation with reserve of title from exercising the necessary controls to

safeguard its reputation and that of its members, nor from demanding the necessary membership fees insofar as the title it confers has a recognized market value. In concrete terms, if a corporation can prove that it groups together the people most likely to provide quality services, then people who have the qualifications for membership will want to belong to it. Already in several other economic fields, producers of goods and services have succeeded in acquiring and maintaining a reputation for excellence owing to the controls exercised by the association to which they voluntarily belong.³⁰

In other words, the corporations in question are informed that by influencing consumer choices they may approach conditions of de facto licensure. When consumers seek out in large part only their members, prospective practitioners will seek out and retain membership as an advantage in the market place. It is conceivable that in extreme cases membership could be a prerequisite to lucrative practice.

The Office notes that the pre-Code corporations with protected titles have succeeded, on the average, in attracting the large majority of eligible persons. Exhibit B to this paper reproduces the Office's data. These indicate that twelve corporations had an average membership of 77% of eligible practitioners. When the three lowest-percentage bodies were removed from the calculation, this figure rose to 90%.

In addition, the Office des Professions has asserted its belief that most of the problems presently perceived by the reserved title corporations are related, not to their legal status, but to the fact that their members are in large part employees and paraprofessionals serving in private companies or public

organizations.³¹ It might be expected that knowledgeable employers will be harder to persuade of the benefits of hiring only corporation members, especially if there is an adverse cost differential. This may be one source of recruiting difficulties, which in turn lead to problems or inadequate revenues and so forth. In any case, it is assumed that their conditions of practice will not often be such as to necessitate more intrusive regulation. Taking for granted that the Office has been responding to these groups in line with their enunciated policy, it can be surmised that even those reserved title groups which have some of the characteristics associated with the present exclusive practice professions are under a general onus of demonstrating that the drawbacks of monopoly are outweighed by the inadequacies of the certification scheme. According to the latest publications supplied to the P.O.C., none of the reserved title corporations originally brought within the Code have had their status formally elevated.

Finally, it should be noted that the Office des Professions has responded positively to the situation facing the reserved title corporations in one important way. In those cases where exclusive practice corporations formulate regulations delegating certain acts to other persons the Office has indicated it will as a general policy recommend that delegated acts be assigned specifically to members of reserve title corporations who are involved in the areas concerned. It is stated that this will ensure that "delegates" will remain under requirements of professional inspection, discipline and so forth, Thus, in

certain areas, members of reserved title corporations may find themselves exclusively empowered to carry out particular tasks in association with exclusive practice professionals.³²

This might be seen as a strange policy. At least in principal it seems to go against the notion that voluntary certification schemes should not be "artificially" provided with market place advantages. It is assumed in the theory of certification schemes that the advent of such differentials should be a product of consumer perceptions, not further regulatory intervention. The guarantee that certain tasks will be reserved to certified persons can easily be a guarantee that only certified persons will be able to practise at all. Even the restricted delegation of one task is likely to have an extended effect, since employers will generally not find it feasible to hire certified persons for one task and non-members for others when the task involved in only one part of the general duties of such persons.

From another perspective the effect of this policy could be seen as beneficial. By guaranteeing that delegated acts are performed by certified persons, it may encourage a greater willingness on the part of exclusive practice professionals to delegate functions. Any reluctance to assign tasks to para-professionals, etc. may be reduced if the principal feels that some of the burden of supervision and quality control has been shifted to the professional corporations. It can be argued that the allocation of functions might thereby be made more rational,

while at the same time the certifying professional corporations are assured that the demand for membership will be sufficient to give them the resources needed to carry on their activities.

In any case, the pursuit of this policy is likely to increase the attractiveness of reserved title status for persons who would be so affected, since it seems to go some way towards recognizing the requests of such groups for exclusive practice rights.

It may belie some of the complaints registered concerning the value of reserved title status to practitioners to note that:

Between April 1974 and July 1976, twenty-three groups working in various sectors of the economy officially made a request to l'Office des professions du Quebec to be established as professional corporations. During this same period, close to forty other groups contacted l'Office for information in this regard, and some of these groups have made it clear that they intend to make a formal request in the near future.³³

Since the discouraging note sounded in s. 26 of the Code alone is not likely to lead to high expectations on the part of these groups that they will be granted exclusive practice rights, it would be fair to say that the majority of these applicants do not expect more than to be instituted, if at all, with reserve of title. Obviously, therefore, the prospect contains some attractions. Since professional or occupational groups are free to organize and grant designations apart from the Code (subject

to ss. 30 and 36) -- and thus without the necessity of incurring the monetary and manpower costs posed by the Code's obligations -- it would seem that that status of reserved title is perceived as beneficial.

III.D Some advantages and disadvantages of reserved title status

This section looks at some of the advantages and disadvantages which may arise from reserved title status under the Professional Code from the perspective of (1) a professional or occupational group and (2) the public interest. The discussion does not pretend to be comprehensive, but simply to point out some of the more obvious features of the legal mechanism in the above regards.

(1) It is difficult to imagine, from the perspective of a voluntary professional association, what disadvantages may accrue from reserved title status under the Code.

It was noted at the beginning of this paper that certain assumptions could be made concerning the desire of professional or occupational groups to appropriate the use of professional designations. It was assumed that groups wish to set themselves apart from other practitioners in the same field, from a desire to further their members' interests or from a concern with providing protection for consumers from poor quality service, or both. Statutory protection of the kind afforded by the Professional Code is arguably the most effective means of discouraging or penalizing the unauthorized use of a title. Under the Code corporations have in a few instances been provided with an exclusive right to a wide generic term -- a status which would be most difficult to acquire and defend otherwise.

Even assuming that an equivalent degree of protection against unauthorized use of a title is otherwise available, Code status is likely to prove an additional advantage to members in that the Code in effect "certifies" the designation involved. For instance, attempts have been made by the Office des Professions to identify to consumers those groups governed by the new legislation and to promote awareness of the educational and disciplinary guarantees, among others, that are implied by possession of a given title.³⁴ To the extent to which such activities establish a tendency among consumers of services to regard a designation as indicative of desirable qualities, the "credibility", as well as the "visibility" of the particular professionals should be increased. Presumably then, so should the market value of their designations and their ability to attract eligible members be increased. In other words, the professionals involved can (at least indirectly) draw upon the resources of the Offices des Professions to enlarge the informational and certifying impact of their titles. It would seem that the acquisition of professional corporation status can only operate in their favour. By contrast, statutory protection under a special Act would not necessarily provide this additional resource.

The advisory and consultative functions of the Inter-professional Council and the Office des Professions established under the Code hold the possibility of beneficial effects in the form of, for instance, greater rationality and less friction in

interprofessional relationships. A forum for individual and mutual concerns is provided. This may be a most important feature given the increasing need for professionals to interact in the work place. Privately incorporated or unincorporated associations are perhaps less likely to be able to create and sustain such structures.

Associations which seek to supervise the practice of their members should find their ability to do so strengthened under the Professional Code. The jurisdictional right of Code bodies to discipline and penalize members, being statutory, may be stronger than that based on a contractual relationship between member and association. Legal authority to take sworn testimony, conduct compulsory professional inspections involving access to files, the provision of fines, and so on would represent a large addition to the powers of a privately incorporated or unincorporated body. (Of course, such powers and authority may be conferred by special Act.)

It may be that the greatest "adverse" effect of becoming a professional corporation would be felt by those associations which had previously been directly and actively involved in the promotion of the professional and economic interests of their members. The Code seems intended to severely restrict such activities. On the other hand, it can be argued that recognition under the Code may strengthen the economic advantage of members in the market for services.

(2) From the perspective of consumers of services it is difficult to evaluate the implications of the system of regulation instituted by the Professional Code.

Assuming that professional designations provide useful information for consumers, the existence of the Code's mechanisms of review and mandatory standards tends to guarantee the "quality" or "reliability" of a large number of professional titles as informational and certifying signs. This is not to suggest that private associations may not provide equally valid guarantees in terms of ensuring that members have met minimum standards of training and competence. The difference is that in regard to many such private associations the public (and particularly the household consumer) is likely to find it difficult to evaluate the organization behind the title, if only because private associations may have fewer resources at their disposal to promote public familiarity with themselves.

Of course, the above assumes that, since "informational" and "certifying" designations are used, it is preferable that there be some means of ensuring their "accuracy" as signs of competence. One question may be whether the obvious cost of a Quebec-style system is commensurate with the "good" provided. It might be that non-licensing bodies are too insignificant in their effects to justify such an expensive system of regulation. Even more fundamental is the question whether non-licensing bodies should

be given the apparent boost in visibility and credibility supplied by the Professional Code's mechanisms. It could be argued that designations (particularly in the form of certifications) should not be relied upon as a means of quality control. To the extent that this is so, the Professional Code's mechanisms may be said to place substantial resources behind -- and confer "legitimacy" upon -- an activity which is of dubious value.

FOOTNOTES

1. See The Professions and Society (Quebec: Official Publisher, 1970); Dussault and Borgeat, Reform of the Professions in Quebec (Quebec: Office des Professions, 1974), at 1 - 3. (Hereafter referred to as "Reform.")
2. Reform, at 2 - 3.
3. Schedule I, Professional Code, S.Q. 1973, c. 43, as amended.
4. See pp. 161 ff , infra.
5. Reform, at 6 - 7.
6. The Premiere, Deuxieme and Troisieme Rapports d'Activities, covering the years 1974-75, 1975-76 and 1976-77 are on file with the P.O.C.
7. The Evolution of Professionalism in Quebec (Quebec: Office des Professions, 1976). (Hereafter referred to as "Evolution.")
8. Ibid.
9. Ibid.
10. Reform at 11, n. (10): S. 25, Draft Professional Code, 29th Legis. 3rd Sess., 1972.
11. Friedman, "Occupational Licensure," Capitalism and Freedom (Chicago: 1962) at 144.
12. 21 ancillary bills were passed by the Quebec National Assembly: Reform at 10, n. 3. See, e.g., s. 19(b), Medical Act, S.Q. 1973, C. 36; s. 6, Professional Chemists Act, S.Q. 1973, c. 63.
13. See pp. 21 ff, supra.
14. See pp. 20 - 21, supra.
15. Ibid.
16. Evolution at 60 ff.
17. Ibid.
18. Ibid., at 32-33, 35
19. Ibid., at 33-34.
20. Ibid., at 61, Reform at 13-14.

21. Evolution, at 62-63.
22. Ibid, at 62-63, 66-67.
23. Ibid, at 64.
24. Ibid, at 63, 65-66; Reform at 12-13.
25. Ibid, at 52-54, 65-68; and 12-13, respectively.
26. Reform, at 12-13.
27. Evolution, at 65.
28. Ibid, at 20, 38-39.
29. See n. 5, supra.
30. Evolution, at 39.
31. Ibid, at 66.
32. Ibid, at 67.
33. Ibid, at 11.

FIELD	ORGANIZATION	DESIGNATION	STATUS	OTHER
Accounting	Inst. of Chartered Accts. of Ont.	Chartered Accountant "C.A."	statutory corporation	
"	Certified Public Accts. Assn. of Ont.	Certified Public Accountant "C.P.A."	"	
"	Society of Management Accts. of Ont.	Registered Industrial Accountant "R.I.A."	"	
"	Certified General Accts. Assn. of Ont.	Certified General Accountant "C.G.A."	private corporation	
"	Inst. of Accredited Public Accts. of Ont.	Accredited Public Accountant "A.P.A."	"	
"	Inst. of Internal Auditors	Certified Internal Auditor "C.I.A."	"	

OTHER

STATUS

DESIGNATION

ORGANIZATION

FIELD

Architecture

Assn. of Arch.
Technolohists of Ont.

Architectural
Technologist
"M.A.A.T.O."

private
corporation

"

Construction
Specifications Canada

Registered
Specifications
Writer
"R.S.W."

"

Engineering

Ont. Assn. of Eng.
Technicians and
Technologists

Certified
Engineering
Technician (or
Technologist)
"C.E.T."

"

"C.E.T." registered
trade mark (cert-
ification mark)

"

Inst. of Chartered
Eng. of Ont.

Chartered
Engineer
"C.E."

unincorporated

"

Canadian Council of
Professional Certification

Certified in
Manufacturing
Engineering (or in
Manu. Technology)
(or in Professional
Engineering)

"

Claims some
copyright
protection

"C.Mfg.E.", "C.Mfg.T"
"R.P.E."

OTHER

STATUS

DESIGNATION

ORGANIZATION

FIELD

private
corporation

Legal Executive
"F.Inst.L.C.O."

Inst. of Law Clerks
of Ont.

Law

unincorporated

Professional Legal
Secretary
"P.L.S."

Metro Toronto Legal
Secretaries Assn. (Can.)

"

EXHIBIT A

ANNEXE I

1. La Corporation professionnelle des avocats du Québec;
2. La Corporation professionnelle des notaires du Québec;
3. La Corporation professionnelle des médecins du Québec;
4. La Corporation professionnelle des dentistes du Québec;
5. La Corporation professionnelle des pharmaciens du Québec;
6. La Corporation professionnelle des optométristes du Québec;
7. La Corporation professionnelle des médecins vétérinaires du Québec;
8. La Corporation professionnelle des agronomes du Québec;
9. La Corporation professionnelle des architectes du Québec;
10. La Corporation professionnelle des ingénieurs du Québec;
11. La Corporation professionnelle des arpenteurs-géomètres du Québec;
12. La Corporation professionnelle des ingénieurs forestiers du Québec;
13. La Corporation professionnelle des chimistes du Québec;
14. La Corporation professionnelle des comptables agréés du Québec;
15. La Corporation professionnelle des techniciens en radiologie du Québec;
16. La Corporation professionnelle des denturologistes du Québec;
17. La Corporation professionnelle des opticiens d'ordonnance du Québec;
18. La Corporation professionnelle des chiropraticiens du Québec;
19. La Corporation professionnelle des audioprothésistes du Québec;
20. La Corporation professionnelle des podiatres du Québec;
21. La Corporation professionnelle des infirmières et infirmiers du Québec;
22. La Corporation professionnelle des comptables en administration industrielle du Québec;
23. La Corporation professionnelle des comptables généraux licenciés du Québec;

SCHEDULE I

1. The Professional Corporation of Advocates of Québec;
2. The Professional Corporation of Notaries of Québec;
3. The Professional Corporation of Physicians of Québec;
4. The Professional Corporation of Dentists of Québec;
5. The Professional Corporation of Pharmacists of Québec;
6. The Professional Corporation of Optometrists of Québec;
7. The Professional Corporation of Veterinary Surgeons of Québec;
8. The Professional Corporation of Agrologists of Québec;
9. The Professional Corporation of Architects of Québec;
10. The Professional Corporation of Engineers of Québec;
11. The Professional Corporation of Land-Surveyors of Québec;
12. The Professional Corporation of Forest Engineers of Québec;
13. The Professional Corporation of Chemists of Québec;
14. The Professional Corporation of Chartered Accountants of Québec;
15. The Professional Corporation of Radiology Technicians of Québec;
16. The Professional Corporation of Denturologists of Québec;
17. The Professional Corporation of Dispensing Opticians of Québec;
18. The Professional Corporation of Chiropractors of Québec;
19. The Professional Corporation of Hearing-aid Acousticians of Québec;
20. The Professional Corporation of Podiatrists of Québec;
21. The Professional Corporation of Nurses of Québec;
22. The Professional Corporation of Industrial Accountants of Québec;
23. The Professional Corporation of Certified General Accountants of Québec;

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| 24. La Corporation professionnelle des diététistes du Québec; | 24. The Professional Corporation of Dieticians of Québec; |
| 25. La Corporation professionnelle des travailleurs sociaux du Québec; | 25. The Professional Corporation of Social Workers of Québec; |
| 26. La Corporation professionnelle des psychologues du Québec; | 26. The Professional Corporation of Psychologists of Québec; |
| 27. La Corporation professionnelle des conseillers en relations industrielles du Québec; | 27. The Professional Corporation of Industrial Relations Counsellors of Québec; |
| 28. La Corporation professionnelle des conseillers d'orientation du Québec; | 28. The Professional Corporation of Vocational Guidance Counsellors of Québec; |
| 29. La Corporation professionnelle des urbanistes du Québec; | 29. The Professional Corporation of Town Planners of Québec; |
| 30. La Corporation professionnelle des administrateurs agréés du Québec; | 30. The Professional Corporation of Chartered Administrators of Québec; |
| 31. La Corporation professionnelle des évaluateurs agréés du Québec; | 31. The Professional Corporation of Chartered Appraisers of Québec; |
| 32. La Corporation professionnelle des hygiénistes dentaires du Québec; | 32. The Professional Corporation of Dental Hygienists of Québec; |
| 33. La Corporation professionnelle des techniciens dentaires du Québec; | 33. The Professional Corporation of Dental Technicians of Québec; |
| 34. La Corporation professionnelle des orthophonistes et audiologistes du Québec; | 34. The Professional Corporation of Speech Therapists and Audiologists of Québec; |
| 35. La Corporation professionnelle des physiothérapeutes du Québec; | 35. The Professional Corporation of Physiotherapists of Québec; |
| 36. La Corporation professionnelle des ergothérapeutes du Québec; | 36. The Professional Corporation of Occupational Therapists of Québec; |
| 37. La Corporation professionnelle des infirmières et infirmiers auxiliaires du Québec; | 37. The Professional Corporation of Nursing Assistants of Québec; |
| 38. La Corporation professionnelle des technologistes médicaux du Québec. 1973, c. 43, Ann. I; 1974, c. 65, a. 40. | 38. The Professional Corporation of Medical Technologists of Québec. 1973, c. 43, Sched. I; 1974, c. 65, s. 40. |

EXHIBIT B

Tableau 5

POURCENTAGE DES MEMBRES DES CORPORATIONS À TITRE RÉSERVÉ PAR
RAPPORT AU TOTAL DES PERSONNES ADMISSIBLES

Corporations	%
Administrateurs agréés	15%
Comptables en administration industrielle	99%
Comptables généraux licenciés	99%
Conseillers d'orientation	85%
Conseillers en relations industrielles	40%
Diététistes	75%
Évaluateurs agréés	98%
Orthophonistes et audiologistes	80%
Psychologues	95%
Techniciens dentaires	99%
Travailleurs sociaux	80%
Urbanistes	55%
Moyenne par corporation	77%

